No. 95-2025-CFH (5)

Title: California, et al., Petitioners
v.
Kenneth Duane Roy

Docketed:
June 17, 1996

Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Jun 17 1996	Petition for writ of certiorari filed. (Response due August 16, 1996)
	Jun 17 1996	Appendix of petitioner filed.
	Jul 3 1996	Order extending time to file response to petition until August 16, 1996.
	Aug 16 1996	Brief of respondent Kenneth Duane Roy in opposition filed.
	Aug 16 1996	Motion of respondent for leave to proceed in forma pauperis filed.
	Aug 28 1996	DISTRIBUTED. September 30, 1996
	Oct 7 1996	REDISTRIBUTED. October 11, 1996
	Oct 15 1996	REDISTRIBUTED. October 18, 1996
	Oct 28 1996	REDISTRIBUTED. November 1, 1996
	Nov 4 1996	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Nov 4 1996	Petition GRANTED. Judgment VACATED and case REMANDED Concurring opinion by Justice Scalia. Opinion per curiam.
		**********
	Nov 27 1996	Petition for rehearing filed.
	Dec 4 1996	DISTRIBUTED. January 3, 1997

1 pp

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

THE PEOPLE OF THE STATE OF CALIFORNIA
and
DANIEL E. LUNGREN,
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Petitioners,

v.

KENNETH DUANE ROY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal Due Process requires, on federal collateral review of state instructional errors related to an element of a criminal offense, that the prosecution meet a higher standard for harmlessness akin to that urged by the concurring opinion in *Carella v. California*, 491 U.S. 376, 105 L.Ed.2d 218, 109 S.Ct. 2419 (1989), rather than the "substantial and injurious effect" standard dictated by *Brecht v. Abrahamson*, 507 U.S. 619, 123 L.Ed.2d 353, 113 S.Ct. 1710 (1993).

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IN THE SUPREME COURT OF THE UNITED STATES

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OPINION BELOW

Petitioners respectfully petition for a writ of certiorari to review the April 15, 1996, en banc decision of the United States Court of Appeals for the Ninth Circuit reversing, on collateral habeas review, a state court judgment and conviction of respondent Kenneth Duane Roy for first degree murder. The majority and dissenting opinions (App. A) are reported as *Roy v. Gomez*, 81 F.3d 863 (9th Cir. 1996). The September 26, 1995, order granting respondent's petition for rehearing and suggestion for rehearing en banc (App. B) is reported at 66 F.3d 254. The reversed and superseded June 9, 1995, opinion of the three judge panel of the Ninth Circuit denying habeas relief (App. C) is reported at 55 F.3d. 1483. The May 10, 1994, order and opinion of the United Stated District Court Eastern District of California (App. D) and the March 5, 1993,

memorandum of Findings and Recommendations of the district court magistrate judge (App. E) are unreported. The state Supreme Court's November 21, 1988, denial of respondent's petition for state habeas review (App. F) also is not reported. The state Court of Appeal remittitur of May 9, 1989 (App. G) is not reported nor are the state Supreme Court order of May 4, 1989, denying petitioners' and respondent's petitions for review and denying depublication (App. H) and the state Court of Appeal February 22, 1989, order denying rehearing (App. I). The majority and dissenting opinions of the California Court of Appeal, Third Appellate District, Case No. C000992 (App. J) are reported in part as *People v. Roy*, 207 Cal.App.3d 642, 255 Cal.Rptr. 214 (1989).

JURISDICTION

The Court of Appeals for the Ninth Circuit entered its en banc judgment on April 15, 1996. App. A. The Ninth Circuit has issued a stay of mandate to June 21, 1996. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, section 1254(1), and Rule 10 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clauses of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution (App. K); article VI, section 13 of the California Constitution (App. L); California Penal Code sections 31, 187, 189, 211, 190.2(a)(3) and (a)(17)(i), and 12022(b) (App. M); California Jury Instructions -

Criminal (CALJIC), as given at respondent's trial, Nos. 2.01 (1979), 2.02 (1979), 3.00 (amended by 4.25), 3.01 (1980), 3.31 (1980), 3.34 (1979), 3.35, 5.30, 8.21, 8.27 (1979), 8.77 (1979), 8.79, 8.80 (1981), 8.81.17 (1980), 8.83, 8.83.1, 901, 17.16 (1977) and 17.45 (App. N).

STATEMENT OF THE CASE

Following affirmance by the California courts of review of his 1983 convictions by jury trial in *People v. Roy*, Butte County Superior Court, Case No. 76386, for aiding and abetting his companion, Jesse McHargue, in the robbery-felony murder and robbery of Arch Mannix and for second degree murder for respondent's actual killing of James Clark with a knife,[1] respondent sought

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1. The jury acquitted respondent of robbing Clark. The jury also found true a robbery-felony murder special circumstance which mandated imposition of a life without parole sentence, but this finding was reversed by the state Court of Appeal (App. J) on direct appeal because it found the instructions "fused guilt and penalty theories" such that the instructions as a whole "plac[ed] the relationship of the robbery to the killing in the identical posture for purposes of culpability, under a felony murder theory, and penalty as a special circumstance." App. J at 14. Petitioners' state petition for review of that part of the decision was denied. App. H. The state Court of Appeal also affirmed in a split decision the underlying first degree felony murder and second degree murder convictions after applying the *Chapman* harmless error test. *See Chapman v. California*, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct 824 (1967) ("*Chapman*"). Respondent's petition for review of that holding was denied. App. H. Reversal of the special circumstance finding required remand for resentencing, and respondent received a minimum state prison term of 46 years as follows: five years for robbery of Mannix plus one year for being armed with a knife in that robbery plus fifteen years to life for the second degree murder of Clark plus twenty-five years to life for the first degree murder of Mannix. App. O. It is respondent's confinement pursuant to his

a writ of habeas corpus in the United States District Court, Eastern District of California, pursuant to Title 28 of the United States Code, section 2254. Challenging only his first degree, robbery-felony murder conviction for killing Mannix and the underlying robbery, respondent claimed the state court erred in finding instructional error under *People v. Beeman*, 35 Cal.3d 547, 199 Cal.Rptr. 60, 674 P.2d 1318 (1984)[2] harmless beyond a reasonable doubt and concluding that respondent had not been deprived of due process and a fair trial. Under *Beeman*, a case decided after respondent's convictions, aiding and abetting instructions are inadequate unless the instructions inform the jury that the offense of aiding and abetting requires an intent to facilitate the criminal offense aided. *Beeman* at 560. The jury here was not so instructed. Thus, error occurred under the due process clause of the United States Constitution. *See* App. K and *Carella v. California*, 491 U.S. 376, 105 L.Ed.2d 218, 109 S.Ct. 2049 (1989) ("*Carella*").

However, the jurors were instructed that to convict they must find respondent was liable for the natural and probable consequences of acts he knowingly aided or encouraged, that he acted with knowledge of McHargue's unlawful purpose (i.e., robbery); that, if it found first degree murder, it must also determine whether it was committed during a robbery and that the robbery was not merely incidental to the commission of

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conviction for the Mannix murder and robbery that is at issue in this case.

2. *Beeman* subsequently was criticized by *People v. Dyer*, 45 Cal.3d 26, 246 Cal.Rptr 209, 753 P.2d 1 (1988), *cert. den. sub nom. Dyer v. California*, 488 U.S. 934, 102 L.Ed.2d 347, 109 S.Ct. 330, which held that *Beeman* error is not reversible per se, but on direct appeal is subject to a *Chapman* beyond-a-reasonable-doubt harmless error analysis. See *Chapman* at 24.

the murder.[3] *See* App. N, CALJIC Nos. 3.00 as amended by No. 4.25, 3.01, 8.27 (1979), 8.80 (1981), 8.81.17 (1980) as given by the trial court and to the jury in writing. *See also*, App. J at 11-14. Petitioners contend that these instructions, the evidence before the jury and the jury's factual findings rendered this error harmless.

Respondent has contended in federal court, as he did throughout the state appellate proceedings, *see, e.g.,* respondent's state habeas petition, paras. 10(a) and 10(b), that the *Beeman* error was not harmless because it deprived him of the right to jury trial and a finding on proof beyond a reasonable doubt as to the intent element of aiding and abetting. The magistrate judge recommended denial of the writ, finding the error harmless. App. E. The district court judge agreed and denied the writ. App. D. In a two to one decision a three judge panel of the Ninth Circuit also agreed and found the error harmless. App. C. The Ninth Circuit

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3. Significantly, the jury was also instructed that to find the robbery-felony murder special circumstance allegation true, as it did, *see* n. 1, *ante* p. 3, it must find beyond a reasonable doubt that respondent "intentionally aided, abetted, counseled, commanded, induced, solicited, requested or assisted the actual killer. . . ." App. N, CALJIC No. 8.80; CT 875-76. The Court of Appeal reversed the special circumstance because it decided that a hyper-technical reading of the language of the felony-murder special circumstance instruction taken in context with the instructions as a whole "fused" the guilt and death-eligibility theories such that the jury could have found respondent intentionally aided a robbery but did not intend the killing that occurred during its commission. Intentional killing is required for a special circumstance finding, but not for an aiding and abetting a first degree felony-murder finding. For the latter, the only intent requirement is the intent to aid the underlying robbery offense. *Beeman* at 560, 561. *See also*, App. J, Court of Appeal opinion at 16, 18-19, 21-22, 25-26, 34; App. C, three judge panel opinion at 9, n. 2.

then granted respondent's request for rehearing and suggestion for rehearing en banc. Apps. C, B. On April 15, 1996, in another split decision (eight to three), the majority opinion of the en banc panel reversed the district court, relying on its own hybrid standard of review culled from three opinions of this Court. First the majority found that, were the case before it on direct review, the error would not be harmless beyond a reasonable doubt under the factors considered in the concurring opinion of Justice Scalia in *Carella*. Therefore, the majority concluded that, under what it described as the "stricter standard for harmless error in habeas cases" mandated by *Brecht v. Abrahamson*, 507 U.S. 619, 123 L.Ed.2d 353, 113 S.Ct. 1710 (1993) ("*Brecht*"), it could not be certain the jury found the "misdescribed" element of intent. Accordingly, the majority held that "a conscientious[4] judge can only be 'in grave doubt as to the harmlessness of the error' *O'Neal*, 115 S.Ct at 995[5], and relief must be granted." Thus, the majority effectively reversed respondent's conviction of the first degree murder and the robbery of Mannix. His conviction for second degree murder of Clark remains intact. App. A at 7.

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4. The majority's lifting of this one phrase from *O'Neal* is curious given that all of the state Supreme Court judges, two of the state Court of Appeal judges, the federal magistrate judge, the district court judge, two of the Ninth Circuit three judge panel members and three of the en banc panel members found the *Beeman* error harmless. One would think that the majority would at least credit each of these judges as having been "conscientious" in their decisions. Also of note, the opinion of the three judge panel was penned by an Eighth Circuit judge sitting by designation. Thus, this case itself essentially reflects the split among the circuits. *See* App. B at 4.

5. *O'Neal v. McAninch*, ___ U.S. ___, 130 L.Ed.2d 947, 115 S.Ct 992 (1995) ("*O'Neal*").

Based on the jury findings, the killing of Mannix occurred right after respondent by his own admission had stabbed Clark to death, and both deaths occurred during two virtually contemporaneous robberies. *See* App. A at 21-22 (dis. opn., Wallace, Cir. J.) The record discloses that on the night of September 13, 1981, respondent, his companion, McHargue, and the two victims, Clark and Mannix, were out driving together in Mannix's truck. Sometime just before 11:15 p.m., a passerby, Maria Smart, saw the truck straddling a ditch. RT 2050, 2564. She asked two men standing by the truck if they needed help. RT 2469. One man, later identified as McHargue, said no they had made a call and pointed down the road. RT 2473, 2482. As Mrs. Smart left in her car, she saw a shirtless man, who appeared to be hurt, lying on the ground moving only his hands. As she drove away, the two other men were standing over him. RT 2469-76.

Sometime later, law enforcement officers spotted the truck at the same place; one of them recognized the truck as belonging to Mannix. RT 2051, 5054-58. It was in the ditch about five and a half feet above water that was twelve inches deep in the ditch. The body of Clark was lying on the other side of the ditch. RT 2057, 2626, 2057-58. It was wet and muddy and had a puncture wound in mid-chest with a small pool of blood. RT 2058. Clark died from a single stab wound through the heart. His jean's pocket had been turned inside out and there was a large amount of dirt on his face and various body surfaces. RT 2690, 2693-94.

Another body, that of Mannix, was under the truck and was submerged in the water. He was shirtless, his pants had been pulled down to his knees, and his wallet and papers were spread on the ground at the rear of the truck. RT 2063-64, RT 2390, 2669. The wallet was empty although Mannix had had a large amount of

cash just the week before. RT 2207, 2637. Mannix had been stabbed in the heart and abdomen and had been drowned; either act could have killed him. RT 2698-01. Post-mortem stab wounds were inflicted above and on his left hip. RT 2711-12. The wounds were consistent with those made by a buck knife. RT 2725. Both victims had a high blood alcohol level (.19 percent for Mannix and .27 percent for Clark). RT 2819.

About 3 o'clock the next morning, investigating officers found respondent and McHargue at a restaurant where they had been for two hours. RT 2069-72, 2668-69. Each of them carried a buck knife. RT 2072-73, 2139. Respondent's pants were wet up to the calf. RT 2285-86. His backpack was wet and muddy, and Mannix's moccasins and vest, both soaking wet, were found inside it. RT 2275, 2424, 2452, 2662. McHargue's backpack was also very wet, his hands were muddy, and his pants were completely wet. RT 2448-49, 2450. After respondent's arrest, Mannix's watch and key ring with keys were found among respondent's belongings, and he had a blue wallet with $170.53 in it. RT 2314, 2318-19, 2326, 2666.

Roy admitted he stabbed Clark and claimed Clark had started hassling him. RT 2182-83. As to victim Mannix, respondent gave several stories. He told arresting officers that, after stabbing Clark, he turned around and Mannix was already in the ditch and that he (respondent) walked away. RT 2183-84. While in jail prior to trial, respondent told inmate William Hudspeth that, after he and McHargue met Mannix and another man (Clark), they planned to rob them, take the truck, and "to take them out," meaning kill them. RT 3118, 3120, 3123-24. He related how McHargue had trouble with Mannix so he, respondent, pulled Mannix off McHargue and stabbed him in the lower part of the body and then pushed Mannix's head under water to

make sure he was dead. RT 3127. He admitted taking the victims' money and clothing. RT 3128-29. Respondent also told Hudspeth he intended to plead self-defense and claim that he and McHargue had been robbed. RT 3131.

Respondent told another jail inmate, Sidney Hall, that he stabbed Clark after Clark had hit him with a stick. RT 3200-01. He again admitted that he helped McHargue hold Mannix under water, RT 3203-04, but later retracted the drowning part of his story. RT 3204. Respondent told Hall that a woman had driven by and stopped at the crime scene. RT 3219.

At trial respondent did not testify; but, by relying on statements made to investigating officers, he claimed self-defense in the killing of Clark and denied killing Mannix. Respondent also argued that mental impairment from alcohol, lack of intelligence and deficiency or disease caused him to reasonably believe in the need for self defense and called two experts, trying to establish his mental limitations. CT 5708, 5710, 5715, 5717-19. Both experts opined that respondent had some brain dysfunction. One opined that he lacked the capacity "to form a clear and deliberate intent to kill a human being" and did not have the capacity to harbor implied malice. RT 3577-78, 3641, 4282-83. The other acknowledged that nothing in the test results indicated that respondent could not form an intent to kill. RT 3657. The prosecution presented evidence contesting the defense experts' findings. RT 4426-27.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the Ninth Circuit majority en banc opinion, as the dissent in this case points out (App. A at 20-21), conflicts with

decisions of the First and Seventh Circuits, *see Libby v. Duvall*, 19 F.3d 733 (1st Cir. 1994) and *Cuevas v. Washington*, 36 F.3d 612, 620, & n. 17 (7th Cir. 1994). Other circuit court opinions and California state court opinions conflict as well, as is more fully discussed below.

Furthermore, the majority opinion is patently wrong; and, by wrongly interpreting the *Brecht* standard of harmless error in tandem with the concurring opinion in *Carella*, the opinion grafts onto the *Brecht* standard the beyond a reasonable doubt standard applicable only to direct review cases. The Ninth Circuit's error will have a significant impact if certiorari is not granted. Rather than settling the conflict on whether a harmless error review is proper and, if so, what standard of prejudice is to be applied on federal collateral review in cases involving state instructional error related to an element of a criminal offense, this case confuses the issue further and will do nothing to abate the proliferation of conflicting decisions in the Ninth circuit or any other court. Accordingly, the need for certiorari is acute.

ARGUMENT

I.

THE MAJORITY OPINION IMPROPERLY GRAFTS THE *CARELLA* STANDARD ON TO THE *BRECHT* STANDARD FOR HARMLESS ERROR REVIEW, CONFLICTS WITH OPINIONS FROM THE FIRST AND SEVENTH CIRCUITS AND, THUS, AGGRAVATES THE SPLIT IN CIRCUIT OPINIONS

A series of cases from this Court has established the standard for evaluating prejudice on federal habeas collateral review of state court error, among them *Brecht* and *O'Neal*. However, the circuit and district courts in split decisions are disputing whether or not and how *Brecht*[6] and *O'Neal* should govern evaluation of jury instruction errors related to an elements of a criminal offense. The instant case well demonstrates the confusion in lower courts because the state Court of Appeal, the three judge circuit panel and the en banc circuit panel all rendered split decisions on this very issue. Some circuit court opinions, like the Ninth Circuit majority opinion in this case, have grafted onto the *Brecht* federal habeas harmless error standard the narrower method for determining prejudice on direct review of federal cases defined by Justice Scalia in his

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6. *Brecht* found harmless the improper use of an accused post-*Miranda* silence for impeachment. *See Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct 1602 (1966). *O'Neal* dealt with the effect of "possible jury 'confusion' arising out of a trial court instruction about the state of mind necessary for conviction combined with a related statement by a prosecutor." *Brecht* at 622-23; *O'Neal* at 994.

concurring opinion in *Carella*. Thus, what is evolving in the circuit and district courts is a higher, hybrid-standard for a finding of harmlessness for instructional error on collateral review. This is in direct contradiction of this Court's mandates in *Brecht* and *O'Neal*.

As the dissenting judge noted upon the Seventh Circuit's reversal of a grant of habeas relief in *Cuevas v. Washington*: This "approach may well result in a determination of harmless error in substantially fewer instances than the usual 'trial error' situation." *Id.* at 624 (dis. opn., Ripple, Cir. J.). Such an increase in overturning state convictions on collateral review clearly opposes this Court's intent as stated in *Brecht* at 637.

For example, in *Libby v. Duvall*, 19 F.3d 753, the lead, concurring and dissenting opinions of a divided three judge panel of the First Circuit urged three different standards for evaluating the prejudicial effect of instructional error. The case exemplifies why review by this Court is necessary.

Having determined that the overall jury charge did not adequately explain the element of malice, the lead opinion determined the error harmless under *Brecht* and rejected the habeas applicant's claim that the *Carella* concurrence method of analyzing harmless error should be applied. The lead opinion conceded that there was evidence upon which the jury "*might* conceivably have" provided a basis for the jury to have concluded the prosecution had not proven its case and that the instructional error (a conclusive presumption) tended to deter the jury from considering that evidence. Nevertheless, it found, after a review of the record evidence, that it was "extremely unlikely that the jury would have relied on the evidence and returned a verdict of manslaughter." *Libby* at 740. Thus it found the error did not have "substantial and injurious effect or influence on the jury's verdict" and found it harmless. *Id.* A

concurring judge affirmed under *Brecht*, but shared the dissenting justice's belief that the "*Carella* concurrence articulates compelling grounds for more narrowly confining 'harmless error' review of a jury instruction mandating a conclusive presumption." *Libby* at 740 (conc. opn., Cyr, Cir. J.). The dissenting judge found the conclusive presumption instruction to be prejudicial under the *Carella* framework for determining harmlessness of the instructional error because the jury was "at least reasonably likely" to have improperly found malice. *Libby* at 743, 744 (dis. opn., Stahl, Cir. J.). The approach of the en banc majority in this case was essentially that of the *Libby* dissent.

In a split decision in *Rosa v. Peters*, 36 F.3d 625 (7th Cir. 1994), the majority of the three judge panel, in analyzing instructional error described as an explicit misdirection of the jury, opined, as did the dissent in this case, that the error was harmless under *Brecht*. *Rosa* at 631-32. However, the dissent, like the en banc majority in the instant case, found that "allowing the approach urged by Justice Scalia in *Carella* to survive *Brecht* is compatible with the principle of judicial restraint and federalism re-emphasized in that opinion." *Rosa* at 637-38 (dis. opn., Ripple, Cir. J.).

Another majority of a three judge panel of the Seventh Circuit found, like the dissent in this case, that the *Brecht* test for harmless error requires a habeas court to evaluate to some extent the probability of outcome if the case were tried under proper instructions. *See Cuevas v. Washington*, 36 F.3d at 621. However, the dissenting opinion in *Cuevas* labeled instructional error a hybrid somewhere between "structural" and "trial" error, *see Arizona v. Fulminante*, 499 U.S. 279, 307, 113 L.Ed. 2d 302, 111 S.Ct 1246 (1991), and argued that the beyond-a-reasonable-doubt approach of *Carella* survives *Brecht* and is the appropriate method of determining

harmlessness on federal habeas review of a state court judgment. *Cuevas* at 625 (dis. opn., Ripple, Cir. J.). This is the approach taken by the Ninth Circuit en banc majority in this case.

The confusion of the foregoing cases is reflected in cases from other circuits and on direct appeal as well. *See Peck v. United States*, 73 F.3d 1220, 1228 (2d Cir. 1995) (reversal required unless the jury actually found knowledge element despite the failure to instruct that knowledge of illegality of structuring accounts is required for intent finding). *See also United States v. Marder*, 48 F.3d 564, 573 (1st Cir. 1995) (noting two different modes of harmless error analysis exist in the circuit courts where a jury instruction misdefines or omits and element of an offense); *Kontakis v. Beyer*, 19 F.3d 110, 117-118 (3d Cir. 1994), rehg. en banc, denied (1994), *cert. den. sub nom. Kontakis v. Morton*, ___ U.S. ___, 130 L.Ed.2d 143, 115 S.Ct. 215 (1994) (no harm under *Brecht* because of the overwhelming evidence that shooting was a purposeful act even given possibility the jury instruction may have kept the jury from considering mental disease and defect evidence).

The same confusion exists in the California state courts. *Compare People v. Harris*, 9 Cal.4th 407, 37 Cal.Rptr.2d 200, 886 P.2d 1193 (1994) (improper instruction on "immediate presence" element of robbery harmless beyond a reasonable doubt) with *People v. Kobrin*, 11 Cal.4th 416, 45 Cal.Rptr.2d 895, 903 P.2d 1027 (1995) (*dicta* suggests reversible per se standard applies to improper instruction to consider perjurious statements material). *Contra*, *United States v. Raether*, 82 F.3d 192, 194 (8th Cir. 1996) (directed finding on materiality of making false statements is "trial error" subject to harmless error analysis). The Court should grant certiorari to review these important conflicts in

applying *Brecht* and resolve the confusion among the circuit and state courts of review.

II.

THE MAJORITY EN BANC OPINION OF THE COURT OF APPEALS IS WRONG

Furthermore, certiorari should be granted because the majority opinion of the en banc panel is patently wrong. Although the opinion correctly concludes that instructional error is trial error[7], it applies an improper standard in finding that error not harmless. In *Brecht*, this Court established that a less onerous standard applies to trial errors upon federal collateral review. *Id.* at 637-38. Thus, only if a state court error "had substantial and injurious effect or influence in determining the jury's verdict," will a federal court be justified in overturning the state court judgment. *Id.* In *Duncan v. Henry*, this Court described the *Brecht* standard as "somewhat similar" to the *Watson*[8] standard used by California courts. *Duncan v. Henry*, ___ U.S. ___, ___, 130 L.Ed.2d 865, 868, 115 S.Ct 887, 888 (1995); *see also*, *id.* at 890 and n.1, last two paragraphs (dis. opn., Stevens, J.). Therefore, where it can be

7. *See Arizona v. Fulminante*, 499 U.S. at 306, and cases cited therein ("trial error"--error which occurs during the presentation of the case to the jury--includes errors arising from infirm jury instructions). *See*, e.g., *O'Neal* at 995 (confusing instruction on state of mind necessary for conviction subject to harmless error test). *But see*, *Cuevas v. Washington*, 36 F.3d at 625 (dis. opn., Ripple, Cir. J.) (instructional error is a hybrid between "structural" and "trial" error); *People v. Kobrin*, 11 Cal.4th at 428 & n.8 (leaving open the question whether instructional error omitting an element of the crime could be harmless error, but strongly suggesting that it cannot be).

8. *People v. Watson*, 46 Cal.2d 818, 836 (1956), held that under the California Constitution, the harmlessness of trial error is measured by a more-probable-than-not standard. *See* App. L; Cal. Const., art. VI, § 13 (misdirection of the jury reversible only upon a "miscarriage of justice").

determined that, absent the error complained of, it is not "reasonably probable" that the defendant would have been acquitted, the error cannot have "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* Finally, in *O'Neal* the Court clarified that if, after "'pondering all that happened,'" a reviewing court finds the error itself had substantial influence or if one is left in doubt, the conviction cannot stand. *O'Neal* at 995, citing *Kotteakos v. United States*, 328 U.S. 750, 764-65, 90 L.Ed 1557, 1566-67, 66 S.Ct 1239, 1248 (1946). The "risk of doubt" is on the state.[9] *O'Neal* at 998. That means that in the narrow circumstance where in the mind of the reviewing judge, "the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error," it should grant relief. *O'Neal* at 994, 999. However, barring that circumstance of "virtual equipoise," it remains that federal habeas relief must be denied where it is reasonably probably that the state court error did not affect the result. *Duncan v. Henry*, 113 S.Ct at 888; *Brecht* at 637-638.

The above principles are simply stated and lend themselves to simple application. Conversely, the majority's opinion conflates these principles such that its application of them is so complex as to defy comprehensible explanation, let alone consistent application. Nevertheless, it is necessary to attempt to explain the decision in order to highlight its fallacies.

As the dissent states, "[t]he majority pays lip-service to the exclusive, less onerous, standard that the

9. This Court chose this terminology rather than "burden of proof" because, as this Court explained, the issue on review is not one of shifting of burdens based on evidence as is the case in the trial court, but it is one of determining whether or not the error itself was "likely" to have been harmful. *O'Neal* at 998.

Court in *Brecht* said we should apply to trial errors when our review is collateral. [However,] the majority erroneously looks to the *Carella* concurrence for the standard of review in habeas corpus cases, and . . . its error is compounded by its misapplication of *Brecht* and [*O'Neal*] . . .." App. A at 17. Although the majority correctly states, and the dissent agrees, that on collateral review the *Brecht* standard supplants the *Chapman* beyond a reasonable doubt standard, the majority rationalizes around the *Brecht* decision. App. A at 15, 17. The majority incorrectly states that the *O'Neal* decision, rather than clarifying that the risk of doubt in close cases is with the prosecution, established an *alternative* standard to that of *Brecht* for relief on collateral review. App. A at 15. ("[R]elief is *also* appropriate if the record . . . leaves the judge in 'grave doubt' . . .." Italics added.)

With this interpretation of *O'Neal* in mind, the majority performed its own beyond a reasonable doubt analysis following guidelines described in the *Carella* concurrence, a case addressing the beyond a reasonable doubt standard for direct review of instructional error. According to the majority opinion in this case, under the *Carella* concurrence guidelines instructional error can be harmless only where the jury "necessarily found" the facts which support the conviction. *Carella* at 271. The majority then holds that "[w]hen the reviewing court is unable to conclude the jury necessarily found an element that was omitted from the instruction, it is unable to gauge the effect of the error on the jury's verdict." App. A at 15-16. Then having circumvented the *Brecht* analysis altogether, the majority concluded that, under the *O'Neal* test, where it is possible, or not beyond a reasonable doubt, that the jury "could have found" different facts or may not have "necessarily found" all the facts as *Carella* dictates, "'a conscientious judge can only

be 'in grave doubt as to the harmlessness of the error,' . . .., and relief must be granted." App. A at 15, 16 citing *O'Neal* at 995.

By thus following its own enigmatic line of reasoning, rather than straightforwardly applying the simple principles of this Court's controlling decisions, the majority essentially holds that whenever *Beeman* instructional error occurs, it is reversible per se.[10/] At the very least, the "majority holds that in every case involving a jury instruction not satisfying the *Carella* concurrence, 'in the judge's mind, the matter is [must be, will be] so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error.'" App. A at 20, citing *O'Neal* at 994. That is simply not the standard for collateral review.

Here, there can be no doubt, certainly no "grave doubt," that had the omitted *Beeman* clause been given (i.e., an instruction that, in addition to acting to aid Mannix with knowledge of Mannix's purpose of robbery, respondent acted with the intent to aid in the robbery), the jury would have rendered the same verdicts. The jury found the killing of Mannix was committed to carry out or advance a robbery or to facilitate escape or avoid detection. *See* App. N, CALJIC No. 8.81.17 (1991 rev.), CT 878. This is evidenced by the jury's true finding on the robbery-felony murder special circumstance allegation. *See* App. O, CALJIC Nos. 8.80, 8.81.17; CT 875-76, 878. The jury also found that respondent aided Mannix while Mannix was committing the robbery with

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10. As the dissent explains, the majority holds "that whenever a jury instruction contains an element that has been misdescribed or omitted and the jury did not actually find the facts supporting the missing element, a judge can never know whether the error had a 'substantial and injurious effect or influence in determining the jury's verdict' as required by *Brecht* . . .." App. A at 17.

knowledge of his (McHargue's) unlawful purpose and that respondent's aid amounted to more than mere presence at the scene and mere knowledge the crime was being committed. *See* App. N, CALJIC No. 3.01; CT 826.

Furthermore, although the CALJIC No. 3.01 instruction here lacked the *Beeman* clause, it has long been recognized by California courts that its absence does not entirely remove the question of mental state under California's aiding and abetting law from the jury's consideration. *People v. Dyer*, 45 Cal.3d at 61. The parties still will recognize that mental state is at issue and have an imperative to put before the jury any evidence that the defendant acted without the requisite intent. *Id.* Thus, the record as made in cases of *Beeman* error can be assumed to be no different than the record would have been had the missing instruction been given. *Dyer* at 61. So it is in this case, and respondent never has contended otherwise.

In addition, as applied to the facts in a particular case, even without the *Beeman* clause, the aiding and abetting instruction may convey to the jury the intent required because in the circumstances of the case, as in the instant case, the instruction (CALJIC No. 3.01 as given here) contains a legally adequate criterion of intent under the California law of aiding and abetting. App. J at 39, Court of Appeal Opinion.

As noted in petitioners' "STATEMENT," *ante* pp. 8-9, respondent presented expert evidence that mental deficiency prevented him from forming the intent to kill and argued that, given his mental limitations and intoxication, he acted in a reasonable belief of a need for self defense in killing Clark. The only evidence to support his theories, apart from expert opinion, was testimony about conflicting hearsay stories respondent gave to the police and two fellow inmates about his

participation in the crimes. The jury found respondent guilty of the second degree murder of Clark[11], guilty of the robbery of Mannix, and guilty of the felony-robbery murder of Mannix, despite his claims of self-defense, mental deficiency, and inability to form intent. Thus, the jury clearly rejected these defenses.

In summary, the jury did not believe that respondent acted in self-defense, did believe he had the capacity to form intent, and did believe that he knowingly and purposefully aided McHargue in the robbery of Mannix and so found beyond a reasonable doubt. "No rational juror could find that [respondent] aided McHargue, knowing what McHargue's purpose was, without also finding that [respondent] intended to aid McHargue in his purpose." App. D at 9, District Court Opinion; App. C at 9, *Roy v. Gomez*, 55 F.3d 1483; App. J.

The en banc majority opined, however, that the jury could have, if properly instructed, found that respondent knowingly and purposefully aided McHargue, not because he intended to assist him in the robbery, but merely to help McHargue defend himself against the victim Mannix. App. A at 13. However, this argument was never advanced by the defense. *See* CT 5666 et seq., closing argument. Moreover, the jury was not instructed on defense of a third person (Mannix) or on "just helping" Mannix as a defense theory.

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11. To find second degree murder under California law, the jury had to find that Clark's murder was an "unlawful killing of a human being as the direct causal result of an act involving a high degree of probability that it will result in death, which act is done *for a base, antisocial purpose* and with wanton disregard for human life by which is meant an awareness of a duty imposed by law not to commit such acts followed by the commission of the forbiden [sic] act despite that awareness." CT 855, CALJIC No. 8.31 as given, italics added.

In support of its hypothetical, possible jury finding, the majority relies on testimony of two inmates, who related what respondent had told them about the killings, and claims their testimony indicates that respondent "realized McHargue was 'getting the worst of it' in his fight with Mannix, and went to McHargue's assistance. . . . to prevent Mannix from defeating McHargue." App. A at 13. However, in the same conversations, respondent told one of these inmates that he and Mannix had planned to rob and kill the victims (RT 3118, 3120, 3123-24), that McHargue had trouble with Mannix so he (respondent) helped him by stabbing Mannix and pushing his head under water and that he then took Mannix's money and clothing. RT 3128-29. Respondent also told the other inmate that he stabbed Clark after Clark hit him with a stick; and, although he later retracted it, respondent also told this inmate that he helped McHargue hold Mannix under water. (RT 3200-04.) Respondent had earlier told officers he walked away before Mannix was killed. RT 2182-84.

Thus, in order to make the hypothetical finding concocted by the majority, the jury would have had to disbelieve all the other testimony of these inmates, focused on minor hearsay testimony, and, unassisted by any instruction or defense argument, come up with the theory that respondent was merely "helping" McHargue defend himself irrespective of any contradictions or conflicting evidence and inferences.

In sum, given the evidence, "there is not even a reasonable probability that [respondent] did not assist McHargue with the intent to further the robbery of Mannix." App. C at 22. Most assuredly, given the evidence, the instructions actually given, the defense arguments, the recognition that mental state was in issue and presentation of all the evidence on that point, and the notable intent actually and ordinarily conveyed when

one acts to aid a perpetrator knowing his criminal purpose; the omission of the *Beeman* clause from the aiding and abetting instruction could not have had a "substantial and injurious effect or influence in determining the jury's verdict." Therefore, the Ninth Circuit en banc majority acted improvidently in granting respondent habeas relief. *Cf. Kontakis v. Beyer*, 19 F.3d at 117-118; *People v. Harris*, 9 Cal.4th at 428-30; *People v. Dyer*, 45 Cal.3d at 63-65. This Court should grant certiorari to correct the Ninth Circuit's error.

III.

THE QUESTION PRESENTED IS IMPORTANT

This case, as well as the federal circuit and state cases cited (see Arg. I, *ante* pp. 11-13) demonstrate the difficulty some courts and some judges have in accepting the less onerous *Brecht* standard for harmless error on collateral review. Given the trend for some to attempt to circumvent that standard as shown by these cases, the confusion will only proliferate.

The need for guidance from this Court is acute, and this case presents in a pristine form a timely and rare opportunity for this Court to address misconceptions about how the rule in *Brecht* is to be applied to instructional error on collateral review; whether *Brecht* replaces on such review the beyond-a-reasonable-doubt guidelines delineated by the concurrence in *Carella* or whether *Carella* circumscribes or supplements the *Brecht* standard; how the circuits, mainly the Ninth Circuit, compound the confusion about the *Carella* standard by misapplying it; and how *O'Neal* modifies either or both of these standards, if at all. The majority opinion in the case at hand is erroneous and contradicts the majority opinions of the state Court of Appeal and the lower federal courts, which reviewed the record and found the error harmless. The issue addressed is undoubtedly important for it impacts every federal collateral review of error in criminal jury trial instructions, especially instructions related to the elements of a criminal offense.

CONCLUSION

An irreconcilable conflict exists among the federal and district courts, and some state courts as well, on a fundamental issue of federal law impacting virtually every criminal jury trial in the United States. This case presents the perfect instrument for resolving these conflicts. For all the reasons discussed above, petitioners respectfully urge that this Court grant certiorari and resolve the important issues of law presented herein.

Dated: June 13, 1996.

Respectfully submitted,

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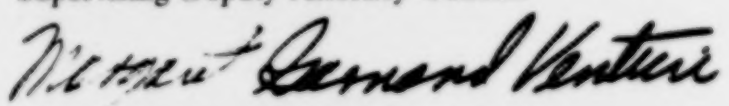

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

THE PEOPLE OF THE STATE OF CALIFORNIA
and
DANIEL E. LUNGREN,
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Petitioner,

v.

KENNETH DUANE ROY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KENNETH DUANE ROY *Petitioner-Appellant,*	)	No. 94-15994
v.	)	D.C. No. CV-89-01643-DFL
JAMES GOMEZ; JOHN VAN DE KAMP; and WILLIAM MERKLE, et al., *Respondents-Appellees.*	)	OPINION

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Argued and Submitted
November 30, 1995--San Francisco, California

Filed April 15, 1996

Before: Procter Hug, Jr., Chief Judge, James R. Browning,J. Clifford Wallace, Betty B. Fletcher, Harry Pregerson, Cecil F. Poole, Stephen Reinhardt, Cynthia Holcolmb Hall, David R. Thompson, Pamela Ann Rymer,and Thomas G. Nelson, Circuit Judges

Opinion by Judge Browning; Partial Concurrence and Partial Dissent by Judge Wallace

SUMMARY

Criminal Law and Procedure/Jury Instructions/ Criminal Acts

Sitting en banc, the court of appeals reversed a district court judgment and remanded. The court held that an error in omitting California's specific intent requirement from an aiding and abetting jury instruction could not be deemed harmless, where it could not be said that the jury necessarily found the required intent.

The bodies of James Clark and Archie Mannix were found near a truck. Both were stabbed, and Mannix had drowned. Appellant Kenneth Roy and Jesse McHargue were located nearby, and each had some of Mannix's property in his possession. Roy told police that the killings occurred after a fight involving the four men.

Roy was charged with murder and robbery. A jailhouse informant testified that Roy told him that Roy and McHargue planned to take Clark and Mannix to the country, rob and kill them, and steal the truck. Another jailhouse informant testified that Roy told him that Roy stabbed Clark during a fight, and Roy tried to help McHargue, who was fighting with Mannix. The state took the murder case to the jury on two theories, arguing that Roy was guilty of first-degree murder because the killings were premeditated and were committed during the course of a felony (the robbery of Clark and Mannix).

The jury was given an aiding and abetting instruction that stated that a person aids and abets commission of a crime if, with knowledge of the perpetrator's unlawful purpose, he aids, promotes, encourages or instigates by act or advice the crime's commission.

The jury found Roy guilty of second-degree murder of Clark and made a "special circumstance" finding that Roy used a knife to kill Clark. The jury acquitted Roy of robbing Clark. The jury found Roy guilty of robbery and

first-degree murder of Mannix, with a "special circumstance" finding that Roy had not used a knife to kill Mannix.

After Roy's case was tried, the California Supreme Court held in *People v. Beeman*, 674 P.2d 1318 (Cal. 1984), that an instruction that was identical to the one given in Roy's case was flawed because an aiding and abetting conviction requires proof that the defendant intended to encourage or facilitate the offense with which the principal was charged.

Roy appealed his convictions of robbery and first-degree murder of Mannix. On direct appeal, Roy contended that the state trial court erred in failing to instruct the jury on the specific intent element of aiding and abetting identified in *Beeman*. The California court of appeal concluded that error occurred, but was harmless beyond a reasonable doubt. The California Supreme Court denied relief on collateral review.

Roy filed a federal habeas petition raising the *Beeman* issue. The district court denied the petition, holding that the omission from the instruction of the specific intent requirement was error, but the error was harmless beyond a reasonable doubt. The court determined that no rational juror could find Roy aided McHargue, knowing McHargue's purpose, without also finding Roy intended to aid McHargue in his purpose. A panel of the court of appeals affirmed. En banc review was granted.

[1] Roy's conviction of first-degree murder of Mannix necessarily reflected a conclusion by the jury that Roy was guiltyof felony murder of Mannix in the course of aiding and abetting McHargue's robbery of Mannix.

[2] The Ninth Circuit has held that omission of the specific intent element from jury instructions in a trial on a charge of aiding and abetting under California law deprives the defendant of his constitutional right to have a jury find the existence of each element of the charged offense beyond a reasonable doubt. The Ninth Circuit has also held that *Beeman* error is subject to harmless-error analysis. [3] Failure to mention an element of a crime does not completely remove from the jury's consideration the evidence relating to that element; it simply fails to alert the jurors that they must consider it. Even though an element of the offense is not specifically mentioned, it remains possible that the jury made the necessary finding. The omission is harmless, however, only if review of the facts found by the jury establishes that the jury *necessarily* found the omitted element.

[4] On the record in this case, it was uncertain whether the jury necessarily found beyond a reasonable doubt that Roy intended to facilitate McHargue's robbery of Mannix. Although there was evidence from which a jury could have found that Roy intended to facilitate Mannix's robbery, there were no findings from which it could be concluded that the jury actually did so. [5] Because it could not be said that the jury necessarily found that Roy acted with the intention of assisting McHargue in the robbery of Mannix, the error in the aiding and abetting instruction could not be deemed harmless.

[6] Reversal was required in this case under the relevant line of cases. When a reviewing court is unable to conclude the jury necessarily found an element that was omitted from instructions, it is unable to gauge the effect of the error on the verdict.

Circuit Judge Wallace, with whom Circuit Judges Hall and Rymer joined, concurred and dissented, disagreeing with the majority's method of harmless-error analysis and its conclusion that the error was harmful.

COUNSEL

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Margaret Venturi, Supervising Deputy Attorney General, Sacramento, California, for the respondents-appellees.

OPINION

BROWNING, Circuit Judge:

This is an appeal from the denial of a petition for habeas corpus. Petitioner Kenneth Duane Roy challenges his state court convictions of robbery and first-degree murder for aiding and abetting a felony murder. He contends the state trial court erred by failing to instruct the jury on the specific intent that is a necessary element of aiding and abetting under California law. The district court agreed, but held the error harmless. A divided panel of this court affirmed. We granted en banc review, and now reverse.

I.

A.

Petitioner Kenneth Duane Roy and his friend Jesse McHargue met Archie Mannix and James Clark outside

a liquor store in Gridley, California. The four began drinking beer. Several hours later, a Gridley police officer saw Mannix's truck narrowly miss a utility pole as it backed up in the store's parking lot. The officer stopped the truck and called another officer to assist. Mannix and Clark were both intoxicated. McHargue and Roy appeared to be sober, but neither had a driver's license. The officers told the men not to drive the truck and left. Two hours later, the truck was gone. The officers found it nose down in a ditch, with the bodies of Clark and Mannix nearby. Both had been stabbed. Mannix, whose body was partially submerged in the ditch, had drowned. Both were partially stripped and their pockets turned out. Mannix's wallet and papers were scattered on the ground. The officers located Roy and McHargue at a nearby restaurant, their clothes wet and muddy. Each was carrying a buck knife. Each had some of Mannix's property in his possession. Roy told police the killings occurred after McHargue lost control of the truck while making a turn, the truck went into the ditch, and Clark became angry and struck Roy. According to Roy, a fight ensued, Roy against Clark and McHargue against Mannix. Roy stabbed Clark and killed him.

Roy was charged with two counts of murder and two counts of robbery. At trial, Marie Smart testified she was driving home when she saw the truck in the ditch and stopped to offer assistance. Two men were standing over Mannix, who was lying on the ground and appeared to be hurt. McHargue told her help had been summoned. A pathologist testified that Mannix's fatal stab wound could have been made by either McHargue's or Roy's knife. Roy's knife bore traces of blood that could have come from either Roy or Mannix but not from Clark.

William Hudspeth, a jailhouse informant, testified Roy told Hudspeth that Roy and McHargue planned to take Clark and Mannix to the country, rob and kill them, and steal the pickup truck. McHargue had trouble subduing Mannix and Roy came to McHargue's aid, pulling Mannix away, stabbing Mannix and holding his head under water until he was dead. According to Hudspeth, Roy and McHargue then took the truck and drove back toward Gridley.

Another jailhouse informant, Sidney Hall, testified Roy told him that after the truck went into the ditch, Clark hit Roy with a stick. A fight followed, and Roy stabbed Clark. Roy saw McHargue was "getting the worst of it" in his fight with Mannix, and "went over to help" McHargue.

The state took the murder case to the jury on two theories, arguing Roy was guilty of first-degree murder (1) because the killings were premeditated and (2) because they were committed during the course of a felony, the robbery of Clark and Mannix. The jury found Roy guilty of second-degree murder of Clark and made a "special circumstance" finding, for purposes of sentencing, that Roy had used a knife to kill Clark. The jury acquitted Roy of robbing Clark. The jury found Roy guilty of robbery and first-degree murder of Mannix, with a "special circumstance" finding that Roy had not used a knife to kill Mannix. Roy challenges his convictions of robbery andfirst-degree murder of Mannix.

B.

[1] The jury's decision to convict Roy of second-degree murder of Clark indicates the jury rejected the state's theory that the defendants planned the crime. The jury also rejected the state's contention that Roy stabbed Mannix by finding Roy did not use a knife against Mannix. Thus Roy's conviction of first-degree murder of Mannix necessarily reflected a conclusion by the jury that Roy was guilty of felony murder of Mannix in the course of aiding and abetting the robbery of Mannix by McHargue.

The jury was given an aiding and abetting instruction which stated that "[a] person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator of the crime, he aids, promotes, encourages or instigates by act or advice the commission of such crime." This instruction allowed the jury to convict Roy if he provided "knowing aid"--that is, if he knew of McHargue's intention to rob Mannix and took some action that had the effect of furthering the robbery. After Roy's case was tried, the California Supreme Court held in *People v. Beeman*, 674 P.2d 1318 (Cal. 1984), that an instruction identical to the one given in Roy's case was flawed because an aiding and abetting conviction requires proof not merely of "knowing aid" but also that the defendant intended to encourage or facilitate the offense with which the principal was charged.[1]

1. According to *Beeman*, an appropriate aiding and abetting instruction would tell the jury that a person aids and abets the commission of a crime when he, "acting with (1) knowledge of the unlawful purpose of the perpetrator, and (2) the intent or purpose of committing, encouraging or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." *Beeman*, 674 P.2d at 1326.

On direct appeal, Roy contended the state trial court erred by failing to instruct the jury on the specific intent element of aiding and abetting identified in *Beeman*. The California court of appeal concluded error had occurred but was harmless beyond a reasonable doubt. The California Supreme Court denied relief on collateral review, and Roy then filed this federal habeas petition raising the *Beeman* issue. In denying the petition, the district court held the omission from the instruction of the specific intent requirement was error, but agreed with the state courts that the error was harmless beyond a reasonable doubt because "[n]o rational juror could find that Roy aided McHargue, knowing what McHargue's purpose was, without also finding that Roy intended to aid McHargue in his purpose." A divided panel of this court affirmed. *Roy v. Gomez*, 55 F.3d 1483 (9th Cir. 1995).

II.

[2] We have held that omission of the specific intent element from jury instructions in the trial of a charge of aiding and abetting under California law deprives the defendant of his constitutional right to have a jury find the existence of each element of the charged offense beyond a reasonable doubt. *Martinez v. Borg*, 937 F.2d 422, 423 (9th Cir. 1991); *see In re Winship*, 397 U.S. 358, 364 (1970) (due process requires proof beyond a reasonable doubt of all elements of the charged offense). We also held in *Martinez* that *Beeman* error is subject to harmless-error analysis. *Martinez*, 937 F.2d at 425. The panel agreed on both points. *Roy*, 55 F.3d at 1485-86.

The panel divided, however, as to whether the error was harmless.

A.

To determine whether the *Beeman* error was harmless, we apply the analysis developed by Justice Scalia in his concurring opinion in *Carella v. California*, 491 U.S. 263 (1989). *See Martinez*, 937 F.2d at 425.[2]

Carella involved a conclusive presumption that relieved the state of its burden of proof with regard to the intent element of embezzlement. Justice Scalia explained that use of such a presumption could be harmless only in the "rare situations" when the reviewing court could be confident that the error played no part in the jury's verdict. *Carella*, 491 U.S. at 270 (Scalia, J., concurring) (quoting *Connecticut v. Johnson*, 460 U.S. 73, 87 (1983)). Stated shortly, such an error is harmless under *Carella* only if no rational jury could find the predicate facts forming the basis for the presumption without also finding the presumed fact. *Carella*, 491 U.S. at 271 (Scalia, J., concurring). In applying *Carella* to an instruction omitting an element of the offense, we have treated the omitted element as the "presumed fact" and considered whether a rational jury could have found the remaining elements of the offense without also finding the omitted element. *Martinez*, 937 F.2d at 424; *see also United States v. Parmelee*, 42 F.3d 387, 393 (7th Cir. 1994).

2. Decisions prior to *Martinez* while not framed in terms of *Carella*, nonetheless applied essentially the same analysis to *Beeman* error. *See Leavitt v. Vasquez*, 875 F.2d 260, 261 (9th Cir. 1989); *Willard v. California*, 812 F.2d 461, 464 (9th Cir. 1987).

Pointing to our recent *en banc* decision in *United States v. Gaudin*, Roy argues we may no longer apply harmless error analysis to *Beeman* error. In *Gaudin*, the district court instructed the jury that an element of the crime was established as a matter of law. We held that "such an error cannot be harmless." *United States v. Gaudin*, 28 F.3d 943, 951 (9th Cir. 1994) (en banc) ("When proof of an element has been completely removed from the jury's determination, there can be no inquiry into what evidence the jury considered to establish that element because the jury was precluded from considering whether the element existed at all."), *aff'd*, 115 S. Ct. 2310 (1995). Relying on this language, some subsequent panel decisions have held omission of an element of a crime from jury instructions requires automatic reversal. *See United States v. Hove*, 52 F.3d 233, 235-36 (9th Cir. 1995); *United States v. Stein*, 37 F.3d 1407, 1410 (9th Cir. 1994).

[3] The error in *Gaudin* differs in a crucial respect from omission of an element of the crime from jury instructions. When a court instructs the jury that an element of the crime has been established as a matter of law, proof of that element of the crime is removed from the jury's purview. Failure to mention an element of the crime, in contrast, does not "completely remove[ ]" from the jury's consideration the evidence relating to that element; it simply fails to alert the jurors they must consider it. *See Gaudin*, 28 F.3d at 951; *United States v. Whitmore*, 24 F.3d 32, 36 (9th Cir. 1994) (omission of knowledge element did not bar jury from considering defendant's mental state); *People v. Dyer*, 45 Cal.3d 26, 64 (Cal. 1988) (*Beeman* error "is not the type of instructional error that wholly prevents the jury from

considering" the defendant's intent).[3] Even though an element of the offense is not specifically mentioned, it remains possible the jury made the necessary finding. Review for harmless error is appropriate, but it is the type of review discussed in *Carella*.[4] That is, the omission is harmless only if review of the facts found by the jury establishes that the jury *necessarily* found the omitted element.[5]

3. To the extent prior cases equate these two distinct situations, such cases are disapproved. *Hove*, 52 F.3d at 235-36 (applying *Gaudin* where judge omitted willfulness element); *Stein*, 37 F.3d at 1410 (applying *Gaudin* where judge omitted knowledge element). *But see Harmon v. Marshall*, 57 F.3d 763 (9th Cir. 1995) (applying *Gaudin* in a "structural error" case where the judge omitted all elements of the charged crime).

4. The instructional error in this case may be described eith er as the omission of an element (specific intent) or as the misdescription of an element (intent). In fact, we have sometimes characterized a *Beeman* error as omission of an element, *see Martinez*, 937 F.2d at 424-25 (9th Cir. 1991), and sometimes as the misdescription of an element, *see Hart v. Stagner*, 935 F.2d 1007, 1012 (9th Cir. 1991). Whether we characterize the error as an omission or misdescription of an element, we must still apply *Carella* harmless error analysis. *See Carella*, 491 U.S. at 270 (Scalia, J., concurring) ("[M]isdescription of an element of the offense . . . deprives the jury of its factfinding role, and must be analyzed similarly [to a conclusive presumption]").

5. Refusal to impose a rule of per se reversal comports with earlier holdings that omission of an element is harmless if the element is not at issue in the case, *see Hart*, 935 F.2d at 1012-13, or if convictions on other counts establish the missing element. *See United States v. Williams*, 935 F.2d 1531, 1536 (8th Cir. 1991) (omission of intent element from one count harmless where intent was defined elsewhere in jury instructions).

B.

[4] On the record in this case, we cannot be certain the jury necessarily found beyond a reasonable doubt that Roy intended to facilitate McHargue's robbery of Mannix, as required under *Carella* and *Martinez* before the instructional error can be treated as harmless. See *Carella*, 491 U.S. at 271; *Martinez*, 937 F.2d at 425 ("The error is harmless if no rational jury would have made these findings without also finding that appellant had the specific intent to aid" the principal's crime). Although there was evidence from which a jury *could have* found that Roy intended to facilitate Mannix's robbery, there were no findings from which we could conclude the jury actually did so.

The testimony of the two jail informers, Hudspeth and Hall, indicates Roy realized McHargue was "getting the worst of it" in his fight with Mannix, and went to McHargue's assistance. From this evidence, the jury could have found Roy's intent was not to help McHargue rob Mannix but to prevent Mannix from defeating McHargue. Alternately, the jury could have found that although Roy realized McHargue was trying to rob Mannix, and in fact aided McHargue by keeping Clark from going to Mannix's aid, Roy did not intend that result.[6]

[5] It was for the jury, not the judges who have reviewed the case, to determine which interpretation of

6. Roy suggested other plausible alternative findings we need not set out here.

the evidence was correct. We are not free to evaluate the evidence and postulate what the jury would have found had it been properly instructed. "[T]he question is not whether guilt may be spelt out of a record, but whether guilt *has been found by a jury* according to the procedure and standards appropriate for criminal trials." *Carella*, 491 U.S. at 269 (Scalia, J., concurring) (emphasis added) (quoting *Bollenbach v. United States*, 326 U.S. 607, 614 (1946). Because we cannot say the jury necessarily found Roy acted with the intention of assisting McHargue in the robbery of Mannix, the error in the aiding and abetting instruction cannot be deemed harmless.[7]

C.

The state argues relief is not warranted because Roy has not shown the error had a substantial or injurious effect on the jury's verdict, as required when the error is raised in collateral proceedings. See *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993). We disagree.

On direct appeal, relief is granted for constitutional error unless the state demonstrates the error was harmless beyond a reasonable doubt. See *Chapman v. California*, 386 U.S. 18,
24 (1967). As Justice Scalia said in *Carella*, the *Chapman* test

7. The state court's determination that the error was harmless does not affect our analysis. Whether an error is harmless is not a factual determination entitled to the statutory presumption of correctness under 28 U.S.C. § 2254(d). *Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995). We review de novo the district court's determination that the erroneous instruction was harmless error. *Id.*; *see Calderon v. Prunty*, 59 F.3d 1005, 1008 (9th Cir. 1995).

can be met only if the reviewing court can tell what the jury
actually found, since only then can the court conclude "'beyond a reasonable doubt,' *Chapman v. California*, 386 U.S. 18, 24 (1967), that the jury found the facts necessary to support the conviction." *Carella*, 491 U.S. at 271. The *Chapman* standard is inapplicable on collateral review, however. In *Brecht*, the Court adopted a stricter standard for harmless error in habeas cases, holding relief is warranted on collateral attack only if the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht*, 113 S. Ct. at 1714 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *see Hegler v. Borg*, 50 F.3d 1472, 1477 (9th Cir. 1995). More recently, the Supreme Court has held relief is also appropriate if the record on collateral review leaves the judge in "grave doubt" as to the effect of the constitutional error. *See O'Neal v. McAninch*, 115 S. Ct. 992, 994-95 (1995). Relief was granted in *O'Neal* because the record was "so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of the error." *O'Neal*, 115 S. Ct. at 995. In such circumstances, "the uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict (i.e., as if it had a 'substantial and injurious effect or influence in determining the jury's verdict')." *Id.* at 994.

[6] We are unable to conclude under *Carella* that the jury necessarily found the missing element; if this case were before us on direct review, the error would not be harmless beyond a reasonable doubt, our analysis would be at an end, and we would be required to reverse the conviction. Because this case reaches us on habeas, however, we must determine whether reversal is required under the *Brecht/O'Neal* line of cases. We believe it is. When the reviewing court is unable to conclude the jury

necessarily found an element that was omitted from the instructions, it is unable to gauge the effect of the error on the jury's verdict. In this situation, a conscientious judge can only be "in grave doubt as to the harmlessness of the error," *O'Neal*, 115 S. Ct. at 995, and relief must be granted.

III.

Roy's due process rights were violated when he was convicted under an aiding and abetting instruction that omitted California's requirement that the defendant have the specific intent to assist in the commission of the crime. Because a rational jury could have found Roy's actions had the effect of assisting McHargue in the robbery of Mannix, but Roy did not intend his actions to have that effect, we are unable to say the jury *necessarily found* the required intent. Under *Carella*, *Brecht*, and *O'Neal*, we cannot say the violation of Roy's due process rights was harmless error.

REVERSED and REMANDED.

WALLACE, Circuit Judge, with whom Circuit Judges Hall and Rymer join, concurring and dissenting:

I agree with the majority that omitting or misdescribing an element of an offense is subject to harmless-error review. However, I cannot agree either with the method of harmless-error analysis the majority employs or with its conclusion that the error was harmful. I respectfully dissent.

I

The majority holds that whenever a jury instruction contains an element that has been misdescribed or omitted and the jury did not actually find the facts supporting the missing element, a judge can never know whether the error had a "substantial and injurious effect or influence in determining the jury's verdict" as required by *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1714 (1993) (*Brecht*) (internal quotation omitted). *See* maj. op. at 4687. By equating error under *Carella v. California*, 491 U.S. 263, 271 (1989) (Scalia, J., concurring) (*Carella* concurrence), with error under *Brecht*, the majority pays lip-service to the exclusive, less onerous, standard that the Court in *Brecht* said we should apply to trial errors when our review is collateral. I believe the majority erroneously looks to the *Carella* concurrence for the standard of review in habeas corpus cases, and that its error is compounded by its misapplication of *Brecht* and *O'Neal v. McAninch*, 115 S. Ct. 992, 995 (1995) (*O'Neal*).

I agree with the majority that *Brecht*'s less onerous standard completely supplants *Chapman*'s harmless-error test when we review collaterally. Maj. op. at 4688; *Brecht*, 113 S. Ct. at 1721-22. I also agree that the *Carella* concurrence explained how the *Chapman* harmless-error test is to be applied on direct appeal when the error involves a jury instruction. Maj. op. at 4688-89. But from these two premises I conclude that because *Carella* was derived from *Chapman*, *Brecht* must supplant *Carella* when we review a jury instruction error collaterally.

Brecht explicitly requires us to apply its standard of review to determine "whether habeas relief must be granted because of constitutional error of the trial type." *Brecht*, 113 S. Ct. at 1722; *see also id.* at 1729 (O'Connor,

J. dissenting) (Court's holding applies "to *any* trial error asserted on habeas"); *O'Neal*, 115 S. Ct. at 994 (*Brecht* "sets forth the standard normally applied by a federal habeas court in deciding whether or not . . . constitutional 'trial' error is harmless"). Misdescription of an element of an offense is trial error. *See Arizona v. Fulminante*, 499 U.S. 279, 306-07 (1991) (jury instruction containing an unconstitutional conclusive presumption is trial error). We should therefore apply *Brecht* -- and *Brecht* alone -- to determine whether the *Beeman* error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 113 S. Ct. at 1714 (internal quotation omitted).

We must also apply *Brecht* rather than the *Carella* concurrence because doing so would be faithful to the Court's insistence that a "less onerous harmless-error standard on habeas promotes the considerations underlying our habeas jurisprudence." *Id.* at 1714. Yet by effectively choosing to apply the *Carella* concurrence instead of *Brecht*, the majority implicitly engages in a balancing that the Court has already done. *Brecht* already balanced the stricter *Chapman* harmless-error standard against policies discouraging habeas corpus relief and concluded that a standard less onerous than *Chapman* was more appropriate in all habeas corpus cases involving trial error. The result of *Brecht*'s balance is clear: providing "habeas relief merely because there is a reasonable possibility that trial error contributed to the verdict is at odds with the historic meaning of habeas corpus -- to afford relief to those whom society has grievously wronged." *Id.* at 1721 (citations and internal quotations omitted). At the very least, *Brecht* requires a reviewing court to ask whether a petitioner suffered "actual prejudice." *Id.* at 1722.

The strict *Carella* concurrence standard, of course, asks not whether there is a "reasonable probability that trial error contributed to the verdict," but whether a rational jury necessarily found certain facts. The *Carella* concurrence explained that *Chapman*'s "harmless beyond a reasonable doubt" standard may not substitute a judge's findings for a rational jury's findings. Under the *Carella* concurrence, an error may be harmful on direct review even if there is a reasonable probability, or a strong probability, or a near-certain probability that the error had absolutely no effect on the outcome. But the Supreme Court has told us that in these situations we may not disturb state convictions collaterally. Simply put, I would not hold, as the majority does, that "society has grievously wronged" every habeas corpus petitioner whose trial contains error that is harmful under the *Carella* concurrence.

I have even more difficulty following the majority's attempt to blend *Carella*, *Brecht*, and *O'Neal*. *See* maj. op. at 4688-89. By first applying the stricter approach in *Carella*, the opinion eliminates the effect of *Brecht*'s "less onerous standard" of review. *Brecht*, 113 S. Ct. at 1721-22. *Brecht* requires the reviewing court to determine whether the error had a substantial or injurious effect on the outcome. *Brecht* also requires such a court to review the record in order to determine an error's effect. The *Carella* concurrence, of course, does not permit this thorough review of the record. Thus, if the majority actually were "to determine whether reversal is required under the *Brecht/O'Neal*" line of cases, maj. op. at 4689, it must thoroughly review the record. Instead, the majority applies only the *Carella* concurrence, limiting inquiry to whether the jury necessarily found the uninstructed element. The majority insists that in every case in which a jury has not actually found the missing

element, a reviewing court is never able to determine whether the instruction error had a substantial and injurious effect. Maj. op. at 4689. Clearly, a judge's ability to determine an error's effect is foreclosed unless the judge thoroughly reviews each case's record with its individual circumstances. This is what Brecht requires. This is what the majority rejects.

I cannot understand how we can know that the "unusual" and "narrow" circumstance in *O'Neal*, 115 S. Ct. at 994, 995 -- which occurs when a judge is in *grave doubt* as to whether an error had a substantial and injurious effect -- will *always* exist when jury instructions are harmful under the *Carella* concurrence. A judge need only reach the "grave doubt" issue in *O'Neal after* being unable to decide whether an error had a substantial and injurious effect. Id. at 994. The majority holds that in every case involving a jury instruction not satisfying the *Carella* concurrence, "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *Id*. But *O'Neal* requires each individual judge reviewing a habeas petition to ask, "Do I, the judge, think that the error substantially influenced the jury's decision?" *Id*. at 995. The majority mandates the answer to that question for every judge in our circuit. Maj. op. at 4689.

In addition, the majority creates intercircuit conflict by refusing to apply *Brecht* instead of the *Carella* concurrence when reviewing collaterally jury instruction errors. *See Libby v. Duval*, 19 F.3d 733, 739-40 (1st Cir.) (holding that *Brecht*'s record-review applies to instructional errors reviewed on habeas corpus and that *Carella* was inapplicable in the habeas corpus context), *cert. denied*, 115 S. Ct. 314 (1994); *Cuevas v. Washington*,

36 F.3d 612, 620 & n.17 (7th Cir. 1994) (applying *Brecht* to instruction error on habeas corpus review).

II

I would therefore apply the standard set forth in *Brecht* and ask whether the district court's failure to include specific intent in the aiding and abetting robbery jury instruction had a substantial and injurious effect on the jury's verdict. The majority searched the record and contends that a rational jury could have found that Roy assisted McHargue in the robbery of Mannix, but also could have found that Roy did not intend his actions to have that effect. Maj. op. at 4687, 4689-90. However, given the evidence that the jury actually heard, this latter possibility does not establish the substantial and injurious effect that *Brecht* requires.

The jury found Roy guilty of second degree murder of Clark, guilty of aiding and abetting the robbery of Mannix by McHargue, and guilty of the felony murder of Mannix, with robbery as the underlying felony. The aiding and abetting instruction actually given required the jury to find that Roy aided in the commission of the robbery offense by McHargue. The instruction also required the jury to find that when Roy provided this aid, he did so with the actual knowledge of McHargue's unlawful purpose. Given what the jury actually found and the evidence in the record supporting Roy's specific intent to further the robbery, I would hold the *Beeman* error harmless under *Brecht*. The error did not have a substantial and injurious effect on the jury's verdict.

I certainly do not have the grave doubt that the majority holds I necessarily must. Roy admitted stabbing Clark. Mannix's shirtless body was found submerged in

water under his truck. Mannix died either from being stabbed or drowned. Mannix's wallet was found with one dollar in it. Upon his arrest, Roy's pants were wet from the calf down. Police found $170 and Mannix's wristwatch among Roy's possessions. Roy told Hall that he "helped" McHargue when McHargue and Mannix were fighting. Hudspeth testified that Roy admitted a plan to rob Clark and Mannix and admitted robbing both. Hall testified that Roy admitted helping McHargue with Mannix. From this I would conclude that there is not even a reasonable probability that Roy did not assist McHargue with the intent to further the robbery of Mannix. Therefore, Roy's habeas corpus petition should be denied.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH DUANE ROY Petitioner-Appellant, v. JAMES GOMEZ; JOHN VAN DE KAMP; and WILLIAM MERKLE, et al., Respondents-Appellees.	)	No. 94-15994 D.C. No. CV-89-01643-DFL ORDER

Filed September 26, 1995

Before: WALLACE, Chief Judge.

Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KENNETH DUANE ROY *Petitioner-Appellant,*	)	No. 94-15994
v.	)	D.C. No. CV-89-01643-DFL
JAMES GOMEZ; JOHN VAN DE KAMP; and WILLIAM MERKLE, et al., *Respondents-Appellees.*	)	OPINION

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Argued and Submitted
April 14, 1995--San Francisco, California

Filed June 9, 1995

Before: Floyd R. Gibson*, Alfred T. Goodwin and
Procter Hug, Jr., Circuit Judges
Opinion by Judge Goodwin; Dissent by Judge Hug

SUMMARY

Criminal Law and Procedure/Defendants and Accused, Rights of/Jury Instructions

The court of appeals affirmed a district court judgment. The court held that the district court did not err in finding that an error in instructing a jury on the

*Honorable Floyd R. Gibson, United States Circuit Judge for the Eighth Circuit, sitting by designation.

intent requirement for aiding and abetting was harmless beyond a reasonable doubt.

After the bodies of Archie Mannix and James Clark were found, appellant Kenneth Roy and Jesse McHargue consented to a search of their backpacks. McHargue's pack yielded Mannix's moccasins and his vest. A search of Roy produced a watch later identified as having belonged to Mannix, Roy was charged with two counts of robbery and two counts of first degree murder.

At trial, Roy did not testify, but the jury heard testimony from two jailmates who swore Roy had told them of his participation in the killing of Clark and Mannix. The state's case was structured on two theories to support first degree murder: premeditation and felony murder. Roy's counsel put on expert evidence in an effort to prove that Roy's mental capacity was impaired. This evidence was introduced to show the jury that Roy was unable to form any intent at all. The state put on evidence to the contrary.

The jury found Roy guilty of second degree murder for killing Clark, but found him not guilty of robbing Clark. The jury answered a special verdict "no" on the question whether Roy used his knife, but found him guilty of first degree murder in the killing of Mannix.

In instructing the jury, the trial court committed a *Beeman* error by failing to tell the jury that an aider and abettor (Roy), must not only know the unlawful purpose of the accomplice (McHargue), but must *intend* to encourage or facilitate the commission of the offense--in this case the robbery of Mannix. On direct appeal, the California court of appeal affirmed the felony murder verdict on the theory of aiding and abetting in the

robbery of Mannix. The court found that the *Beeman* error was harmless beyond a reasonable doubt, and the state supreme court denied post conviction relief.

Roy petitioned for a writ of habeas corpus in the district court. The court found the *Beeman* error harmless beyond a reasonable doubt. Roy appealed the denial of his habeas petition, contending that because the trial court's instruction did not conform to the requirement of *People v. Beeman*, the jury was permitted to convict him without finding an element of the crime.

[1] In this case, the only rational way the jury could have found Roy guilty on a felony murder theory was by making a preliminary predicate factual finding that Roy intended to help McHargue rob Mannix, while knowing that McHargue intended to rob Mannix. [2] Whether or not the *Beeman* instruction had been given, on the evidence in this case, no jury could fail to find that Roy intended to aid McHargue in subduing and robbing Mannix. There was no other rational explanation of the physical evidence and the testimony about Roy's admitted participation in the robberies and murders that could be consistent with the verdict. [3] The only rational route which the jury could have followed to reach the verdict it reached in this case had to include the implicit finding that Roy intended to help McHargue, knowing McHargue's purpose. That verdict was supported by evidence and was completely rational.

Circuit Judge Hug dissented, noting that the jury did not find that Roy intended to aid in the robbery.

COUNSEL

Hill C. Snellings, Blackmon & Drozd, Sacramento, California, for the petitioner-appellant.

Margaret Venturi, Deputy Attorney General, Sacramento, California for the respondents-appellees.

OPINION

GOODWIN, Circuit Judge:

Kenneth Duane Roy appeals the denial of his habeas corpus petition challenging his 1983 California conviction for first degree murder and robbery. Roy's principal point on appeal is that because the Superior Court's instruction did not conform to the requirements of *People v. Beeman*, 35 Cal. 3d 547 (1984), the jury was permitted to convict him without finding an element of the crime. *Carella v. California*, 491 U.S. 376 (1989) (Justice Scalia concurring).

FACTS

On September 13, 1981, Kenneth Roy and one Jesse McHargue, while hitch hiking near Gridley, California, met Archie Mannix and James Clark outside a liquor store and began drinking beer with them. A Gridley police officer observed the foursome in a pickup truck. The officer stopped the truck and advised the four not to drive.

Sometime after midnight, officers came upon the pickup truck nose down in a ditch. The bodies of Clark and Mannix were found. The bodies showed signs of stabbing. Mannix's body was partly submerged in the ditch water under the truck. His body later revealed evidence of drowning. Both bodies showed signs of having been stripped of clothing, and such clothing as was found showed the pockets turned out. Blood was found on bushes, and papers, not otherwise described, were found scattered near the truck. Roy and McHargue were not present, but were found about 3 a.m. in a nearby restaurant. Both men were wearing wet and muddy clothing.

Roy and McHargue were informed of their Miranda rights and consented to a search of their backpacks. McHargue's pack yielded Mannix's wet moccasins and his vest. After the two men were arrested, a search of Roy produced a Buck knife, $ 170.52 in cash, and a watch later identified as having belonged to Mannix. Roy was charged with two counts of robbery and two counts of first degree murder.

At trial, Roy did not testify, but the jury heard testimony from two jail inmates who swore Roy had told them of his participation in the killing of Clark and Mannix.

The state's case was structured on two theories to support first degree murder: premeditation and felony murder. The prosecutor argued that Roy and McHargue planned to drive to a remote location, rob and kill both victims, and steal their pickup truck. The prosecution argued that the physical evidence, the testimonial evidence that the victims had money and the defendants had none, and the testimony about admissions Roy

allegedly made to jailed informers proved that Roy killed Clark while McHargue was struggling with Mannix, and that after Roy had killed Clark, Roy helped McHargue rob and kill Mannix. The evidence was sufficient to take both theories to the jury. The state also sought a verdict of special circumstances, based on the use of knives in the stabbing deaths of the two victims, but this issue was eliminated in state court proceedings.

The jury found Roy guilty of second degree murder for killing Clark, but found him not guilty of robbing Clark. The jury answered a special verdict "no" on the question whether Roy used his knife, but found him guilty of first degree murder in the killing of Mannix.

Roy now argues, and we agree, that the verdict of second degree murder of Clark eliminates the theory of premeditation in Roy's conviction of first-degree murder. The validity of Roy's first degree murder conviction in the killing of Mannix thus depends on felony murder in the course of aiding and abetting the robbing of Mannix.

INSTRUCTIONS

The trial court instructed the jury orally and in writing,[1] *inter alia*, "[t]o find that the special circumstance, referred to in these instructions as murder in the commission of robbery, is true, it must be proved: [1] That the murder was committed while the defendant was engaged in or was an accomplice in the commission of a robbery. [2] That the murder was committed in order to carry out or advance the commission of the

1. The appeal has not challenged minor differences between instructions as read to the jury and those sent into the jury room in written form.

crime of robbery. . . . In other words, the special circumstance referred to. . .is not established if the. . .robbery was merely incidental to the commission of the murder."

The jury was also instructed "if a human being is killed by any one of several persons engaged in the perpetration of, or attempt to perpetrate, the crime of robbery, all persons who. . .with knowledge of the unlawful purpose of the perpetrator of the crime aid. . .its commission, are guilty of murder of the first degree, whether the killing is intentional, or accidental." CALJIC No. 8.27 (1979).

The jury was further instructed that one "who aids and abets is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but he is also liable for the natural and reasonable or probable consequences of any act that he knowingly aided or encouraged." CALJIC No. 300 as amended by CALJIC No. 4.25.

CALJIC No. 301 as given, reads: "A person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator of the crime, he aids, promotes, encourages or instigates by act or advice the commission of such crime."

The *Beeman* error in the above instruction consisted in the failure of the court to tell the jury that an aider and abettor (Roy) must not only know the unlawful purpose of the accomplice (McHargue), but must *intend* to encourage or facilitate the commission of the offense--in this case the robbery of Mannix. *See Beeman*, 35 Cal. 3d at 561. (*Beeman* had not been decided when the case was tried.)

On direct appeal, the California court of appeal affirmed the felony murder verdict on the theory of aiding and abetting in the robbery of Mannix. The court of appeal found the *Beeman* error harmless beyond a reasonable doubt, and the state supreme court denied post conviction relief in 1989.

The petition for habeas corpus in the district court followed. The district court again found the *Beeman* error harmless beyond a reasonable doubt, saying: "No rational juror could find that Roy aided McHargue, knowing what McHargue's purpose was, without also finding that Roy intended to aid McHargue in his purpose." We agree.

DISCUSSION

The appeal advances the argument that because no *Beeman* instruction was given on intent, an essential element of the crime, *Carella*, requires a new trial. We have in the § 2254 cases collected in *Martinez v. Borg*, 937 F.2d 422, 424 (9th Cir. 1991), refused to find the *Beeman* error harmless beyond a reasonable doubt. But the teaching of the *Carella* line of cases tells us to look to what the jury actually decided, not what we, as judges, believe the jury would have decided if they had been properly instructed. We have held that if jury instructions omit an element of the offense, (in this case, specific intent) constitutional error results. *See Martinez*.

[1] If the jury returned a verdict from which it could be said that the jury actually made the essential predicate fact finding, then we affirm. Here, the only rational way the jury could have found Roy guilty on a felony murder theory was by making a preliminary predicate factual finding that Roy intended to help McHargue rob Mannix, while knowing that McHargue

intended to rob Mannix. It is therefore necessary for us to review the record, the instructions as a whole, and the verdict, to determine whether the jury, despite the incomplete instruction, had to find every material element of the offense in order to return the verdict it returned.

Roy argues the jury could have found that he knew McHargue intended to rob Mannix and helped him do so without necessarily finding that Roy intended to assist in the robbery. Roy, as noted, did not testify. His counsel put on expert evidence in an effort to prove that Roy's mental capacity was impaired by intoxication, as well as by his inherent immaturity and lack of mental acuity. This evidence was introduced to show the jury that Roy was unable to form any intent at all, much less an intent to help McHargue rob Mannix. The state put on evidence to the contrary. The jury was entitled to disbelieve Roy's experts.

[2] Whether or not the *Beeman* instruction had been given, on the evidence in this case, no jury could fail to find that Roy intended to aid McHargue in subduing and robbing Mannix.[2] There was no other rational explanation of the physical evidence and the testimony about Roy's admitted participation in the robberies and murders that could be consistent with the verdict.

[3] Hypothetical and imaginary scenarios perhaps may be contrived to suggest that Roy did not intend to help

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2. It was not necessary that the jury find that Roy intended to help McHargue kill Mannix. Such a finding could have found support in the evidence, but was not requested, because aiding in the robbery of Mannix which resulted in his death was a sufficient finding to support Roy's felony murder verdict.

McHargue rob Mannix. But the jury had before it the defense evidence that attempted to cast doubt on Roy's capacity to form any intent, criminal or otherwise, and the jury obviously did not believe that evidence. We conclude, as did the California courts and the District Court, that the only rational route which the jury could have followed to reach the verdict it reached in this case had to include the implicit finding that Roy intended to help McHargue, knowing McHargue's purpose. That verdict was supported by evidence, and was completely rational. *Hegler v. Borg*, 1995 U.S. App. Lexis 6113 (quoting *O'Neal v. McAninch*, 115 S. Ct. 992, 995 (1995), "Only if the record demonstrates the jury's decision was substantially influenced by the trial error or there is '"grave doubt" about whether an error affected a jury in this way' will [Roy] be entitled to habeas relief.").

AFFIRMED

HUG, Circuit Judge, Dissenting:

The majority recognizes that under Supreme Court and Ninth Circuit precedent we must only look to what the jury *actually decided* in determining an essential element of a crime not what we as judges *believe the jury would have decided* if it had been properly instructed. *See Carella v. California*, 491 U.S. 263, 268-69 (1989) (Scalia, J., concurring); *Yates v. Evatt*, 500 U.S. 391, 404 (1991); *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2082 (1993); *Martinez v. Borg*, 937 F.2d 422, 424 (9th Cir. 1991). However, the majority fails to apply that law to this case.

The majority acknowledges that there was a "*Beeman*" error in the trial court's failure to instruct the jury that,

in order to find Roy guilty of aiding and abetting the robbery of Mannix, it must find that Roy *intended* to encourage or facilitate the robbery. Although there clearly is evidence from which a jury *could have* found the requisite intent, there is no way we can say that the jury *did* find that intent. There is no "predicate" finding from which we can say that the jury actually *found* the requisite intent, as the majority indicates.

The majority simply weighs the evidence and substitutes its judgment because it finds the other possibilities "fanciful." This is the very type of harmless error analysis that is foreclosed by *Carella*, *Yates*, *Sullivan*, and *Martinez*.

From the evidence at trial, it was quite possible the jury could have found that Roy's intent in coming to McHargue's aid in the fight with Mannix was to save McHargue from being killed, not to aid in a robbery. Or the jury could have found, among other possibilities, that by fighting with Clark, Roy in fact aided McHargue in a robbery without intending his fight with Clark to have such an effect. Or the jury simply could have found that Roy did not intend to aid in the robbery for whatever reason. The point is the jury did not make the finding, and we as appellate judges cannot supply our finding on an essential element of the crime for one the jury did not make.

A jury finding that Roy intended to aid in the robbery was a necessary finding of an essential element of the charged crime of felony first degree murder. The jury did not make this finding. This error cannot be harmless. I would grant this petition for habeas corpus on the first degree murder conviction for the murder of McHargue. This, of course, would not affect Roy's conviction of

second degree murder for the murder of Clark.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

KENNETH D. ROY, **Petitioner,** **v.** **JAMES GOMEZ, et al.,** **Respondents.**	Civ. S-89-1643-DFL-PAN O R D E R

Petitioner Kenneth D. Roy, a state prisoner represented by counsel, seeks a writ of habeas corpus under 28 U.S.C. § 2254. The magistrate judge issued findings and recommendations on March 5, 1993, recommending that the petition be denied. The court heard oral argument on July 30, 1993, on petitioner's objections to the findings and recommendations. The court has deferred rendering a decision in this case

because of the grant of en banc hearing in United States v. Gaudin, 997 F.2d 1267, en banc review granted, 5 F.3d 374 (9th Cir. 1993), a case on which petitioner places some considerable reliance. No decision has been forthcoming in Gaudin, however, and it appears unwise to defer decision any further in this case.[1]

The facts of the case are well stated in the findings and recommendations. Roy contends that the aiding and abetting instruction given at trial was defective under People v. Beeman, 35 Cal.3d 547 (1984), which was decided after Roy's trial but before his conviction became final. In Beeman, the California Supreme Court found that the aiding and abetting instruction in CALJIC No. 3.01--which was the

1. If the en banc court finds that harmless error analysis may be applied then Gaudin will provide no support for petitioner. On the other hand, if the en banc court accepts the approach of the panel in Gaudin, the decision is not likely to address cases involving the court of instruction error alleged here.

instruction given by the trial court here[2]--was adequate because it did not expressly instruct the jury that an aider and abettor must have the intent to encourage or facilitate the commission of the offense. The court suggested that an appropriate aiding and abetting instruction would include an additional clause on intent:

> a person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator, and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by actor advice aids, promotes, encourages or instigates, the commission of the crime.

Id. at 561 (emphasis added).

Following state court precedents subsequent to Beeman, the court of appeal found that the

2. The jury was instructed that "[a] person aids and abets the commission of a crime if with [1] knowledge of the unlawful purpose of the perpetrator of the crime he [2] aids, promotes, encourages or instigates by act or advice the commission of such crime." Findings and recommendations at 11.

"instruction found wanting in Beeman (CALJIC No. 3.01 [1980]) and given here, may convey the required intent to the jury because in the circumstances of the case it contains a legally adequate criterion of intent." People v. Roy, No. C000992, slip. op. at 25 (Cal. Ct. App. January 27, 1989) ("Roy II"). The court reasoned that if the defendant did not intend his actions or if the defendant, intending his actions, did not know that his acts would aid the principal, then the failure to include an instruction as required by Beeman would be fatal. Absent such circumstances, however, it was adequate if the jury were instructed that it must find that the defendant acted with knowledge of the principal's unlawful purpose and provided aid or encouragement to commit the offense. Id. at 26-28. After reviewing all of the different possible factual circumstances under which the jury could have convicted Roy, the court of appeal found

no circumstance in which the challenged instruction could have prejudiced the defendant.[3]

In habeas corpus cases involving Beeman error, the Ninth Circuit uses and approach similar to that used by the California court of appeal here. In Willard v. California, 812 F.2d 461 (9th Cir. 1987), the court found that the absence of an instruction on specific intent was harmless beyond a reasonable doubt because intent was not at issue in the case, and the jury could not have convicted "without also finding that [defendant] had the requisite intent." Id. at 465. In Leavitt v. Vasquez, 875 F.2d 260 (9th Cir. 1989), the court followed Willard by applying harmless error analysis and used the test for harmless error suggested

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3. "Under the circumstances of this case, the assistance to McHargue by defendant in the perpetration of the robbery, with defendant's knowledge of McHargue's purpose, unambiguously reveals defendant's awareness of the importance of his acts in advancing the robbery. In the absence of evidence establishing some contrary intent, no other inference is permissible from that act." Roy II, at 30.

by Justice Scalia's concurring opinion in Carella v. California, 491 U.S. 263, 109, S. Ct. 2419 (1989).

Under the Scalia test, harmless error may be found:

> When the predicate facts relied upon in the instruction, or other facts necessarily found by the jury, are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact, making those findings functionally equivalent to finding the element required to be presumed.

Id. at 2423. The Willard court held that in the particular circumstances of the case the jury's finding that the defendant gave aid with knowledge of the principal's criminal purpose was the functional equivalent of finding that defendant acted with the requisite specific intent to facilitate the principal's crime.

In Martinez v. Borg, 937 F.2d 422 (9th Cir. 1991), the court again used the harmless error analysis suggested by Justice Scalia:

> In applying the Scalia test to this case, we examine the findings made by the jury. The error is harmless if no rational jury would have made these findings without also finding that [petitioner] had the specific intent to aid the murder and attempted murder.

Id. at 425. The court found that the Beeman error was not harmless in this case because there was evidence at trial that the defendant did not have the specific intent to aid the commission of the offense. The court's analysis of the evidence also suggested that the jury could have convicted without finding that when Martinez assisted the principal he understood the principal's criminal purpose.[4]

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4. The opinion in Martinez does not quote the aiding and abetting instruction that was given. However, the description of the instruction suggests that it did not require--as the instruction did here--that the jury must find that the defendant acted to aid the offense with knowledge of the principal's unlawful purpose. See Martinez, 937 F.2d at 425 ("The jury instruction required the jury to find only that appellant knew the perpetrator's criminal purpose and that appellant did some act of aiding, abetting, or encouraging in the commission of the offense."). This omission from the instruction is critical and would explain the court's analysis of the evidence in Martinez.

Finally, in Hart v. Stagner, 935 F.2d 1007 (9th Cir. 1991), the court again looked to "the predicate facts the jury must have found to convict [the defendant] under the instructions it was given" and then determined whether "the jury must have necessarily found the element on which the jury instructions were incorrect." Id. at 1012. In view of the facts of the case, the court concluded that no rational jury could have found that defendant knew of the principal's criminal purpose but acted without an intent to aid in the commission of the crime. Id. The court noted that the defense at trial was not one of lack of intent. Id. at 1013.

The jury in this case found Roy guilty of second degree murder of Clark, guilty of aiding and abetting the robbery of Mannix by McHargue, and guilty of the felony murder of Mannix, with robbery as the underlying felony. The aiding and abetting instruction

actually given required that the jury find that Roy aided in the commission of the robbery offense and that when he provided this aid he did so with knowledge of McHargue's unlawful purpose. As both the magistrate judge and court of appeal have explained in some detail, the jury's findings that Roy assisted McHargue's robbery of Mannix knowing McHargue's purpose are the functional equivalent of a finding of specific intent. No rational juror could find that Roy aided McHargue, knowing what McHargue's purpose was, without also finding that Roy intended to aid McHargue in his purpose. This kind of "knowing aid," in the language of the court of appeals, is synonymous with specific intent, at least when there is no contrary evidence suggesting that the acts were involuntary or that specific intent was otherwise lacking. Here Roy did not argue that he lacked the intent to aid McHargue except to the extent that he

contended that because of diminished capacity he lacked the ability to form intent, a contention rejected by the jury in its conviction of Roy for the murder of Clark. The factual scenarios suggested by petitioner in which he may have assisted McHargue to rob Mannix, without intending to do so, ignore that the jury was required to find that when Roy acted to give aid to McHargue, he did so with knowledge of McHargue's unlawful purpose. This case is not fairly distinguishable from Leavitt, Willard, and Hart. The Beeman error that occurred here was harmless beyond a reasonable doubt.

Petitioner also argues that the harmless error approach is itself error because the removal of an element from the jury's consideration can never be harmless but amounts to an impermissible directed verdict for the state. As the discussion above demonstrates, it is well established that claims of

Beeman error are evaluated under a harmless error standard. The court in United States v. Gaudin, 997 F.2d 1267 (9th Cir. 1993), does not purport to alter this approach In Gaudin the district court erroneously removed the question of materiality from the jury by instructing it that the alleged false statements were material as a matter of law. The court found that harmless error analysis could not be applied in this circumstance because the element of materiality had been "completely removed" from the jury's consideration. Id. at 1272. In these circumstances, unlike Martinez and Justice Scalia's approach, "there can be no inquiry into what evidence the jury considered to establish that element, because the jury was precluded from considering the element at all." Id. By contrast, here intent was not completely removed from the jury's consideration. Rather, the jury was not instructed, or was imperfectly instructed,

on intent to aid and abet.[5] For these reasons, Gaudin does not apply here. Moreover, Gaudin does not question the continued use of the well established harmless error analysis in cases involving Beeman error. Indeed, Gaudin expressly relies upon Martinez. See also Hennessy v. Goldsmith, 929 F.2d 511 (9th Cir. 1991).

Nor does Sullivan v. Louisiana, 113 S. Ct. 2078 (1993), suggest that harmless error review should not apply to the instructional error here. In Sullivan the Court reaffirmed the appropriateness of such review to cases involving instructions incorporating mandatory presumptions. Beeman error is a similar kind of error because the jury finds--or is presumed to find--the requisite intent by finding knowing aid. The Court

5. As suggested by the court of appeal in its decision, the instruction that was given, requiring a finding of "knowing aid," is a sufficient implicit instruction on the requisite intent in the circumstances. In this sense, the element of intent was presented to the jury for consideration without the word "intent."

reaffirmed that when the jury finds facts "so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact" then harmless error may be found because "the presumption played no significant role in the finding of guilt beyond a reasonable doubt." Id. at 2082. However, when as in Sullivan, the reasonable doubt instruction is defective, such that all of the jury's fact findings are unreliable, there can be no harmless error analysis because there are no jury findings from which to ask what further a reasonable jury must find. Sullivan has no bearing on the continued use of harmless error analysis to cases involving Beeman error. If anything, it affirms the continued validity of that approach.

The court adopts the findings and recommendations submitted by the magistrate judge

and reject petitioner's objections. The petition for habeas corpus is DENIED.

IT IS SO ORDERED.

Dated: 9 May 1994.

/s/
DAVID F. LEVI
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

KENNETH D. ROY, **Petitioner,** **v.** **JAMES GOMEZ, et al.,** **Respondents.**	Civ. S-89-1643-DFL-PAN FINDINGS AND RECOMMENDATIONS

Petitioner Roy, a state prisoner proceeding in forma pauperis and pro se, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This proceeding was referred to me by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

Roy and McHargue were hitchhiking near Gridley when they met the victims, Clark and Mannix, who had a truck. That night, Clark and Mannix were

found dead near their truck, which was wrecked in a water-filled ditch; Clark was stabbed once and Mannix was stabbed seven times. When Roy and McHargue were found, they both had knives, their pants were wet, Mannix's belongings were found in Roy's pockets and McHargue's wet backpack. A Butte County jury found Roy (1) guilty of second degree murder of Clark, (2) not guilty of robbing Clark, (3) not guilty of using a knife in the murder of Mannix but (4) guilty of aiding and abetting the first degree murder and robbery of Mannix armed with but not using a knife.[1]

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1. The jury convicted Roy of the robbery and first degree murder of Mannix and found that he possessed but did not use a knife in the commission of those offenses. People v. Roy, 207 Cal.App.3d 642, 644 (1989) ("Roy I"); Clerk's Tr. ("CT") at 760, 762, 765-66. In a sworn declaration, Robert Shields, the jury foreman, stated that the jury unanimously agreed that Roy was guilty of the first degree murder of Mannix because of aiding and abetting a felony murder. CT at 1076. Federal Rule of Evidence 606(b) prohibits the admission of a juror's affidavit concerning any matter or statement occurring during the course of the jury's deliberations or the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or concerning the juror's mental processes in connection therewith. However, Rule 606(b) does not prohibit admission of a juror's affidavit to clarify an ambiguous verdict or to correct a judgment to reflect the intent of the jury. United States v. Stauffer, 922 F.2d 508, 511, 513-14 (9th Cir. 1990); McCollough v. Consolidated Rail Corp, 937 F.2d 1167, 1172, (6th Cir. 1991); J. Weinstein & M. Berger, Weinstein's Evidence § 606[04] at p. 606-30 (1992). Here, because the jury was instructed on several theories of first degree murder, a juror affidavit clarifying the specific theory relied upon is admissible.

The state presented alternative theories. First, the state contended that Roy and McHargue planned to rob and kill the victims. Alternatively, the state contended that the killing occurred during the commission of robbery.

Since the jury found Roy guilty of only second degree murder of Clark and not guilty of robbing Clark, the California Court of Appeal inferred that the jury found that Roy did not plan to murder either victim, i.e., it rejected the state's first theory thus leaving the theory that the killings occurred during the commission of robbery.

Under California law, Roy might be convicted of felony-murder if Mannix's death was unintentional but nonetheless a natural, reasonable or

probable consequence of robbery. But Roy could be found guilty of the special circumstance of a murder in the course of a robbery, which finding exposed Roy to the death penalty, only if Roy acted with the intent to aid in the killing.

The California Court of Appeal found that the evidence supported reasonable inferences by the jury that two simultaneous fights ensued following the wreck of Mannix's truck; that Roy fought Clark while McHargue fought Mannix; that Roy independently fatally injured Clark and McHargue mortally injured Mannix; that thereafter, McHargue dragged or struggled with Mannix to the ditch where McHargue drowned Mannix; and that Roy's only participation in the offenses against Mannix was taking Mannix's property or assisting McHargue so to do. Roy I, slip op. at 20.

The jury was not instructed that it must find that Roy intended to aid the killing of Mannix in order to be found guilty of the charged special circumstance and, accordingly, the court of appeal reversed that finding.

On remand from the court of appeal, the trial court resentenced Roy to a minimum prison term of 46 years. People v. Roy, No. C007071, slip op. at 2 (Cal. Ct. App. Sept. 24, 1990) ("Roy II").

Now Roy argues that his felony-murder conviction must also be reversed because the jury was not instructed that to be guilty as an aider and abetter, Roy must have intended to aid and abet McHargue. People v. Beeman, 35 Cal.3d 547 (1984).

Facts

Roy and McHargue went to a liquor store in Gridley were they met James Clark and Archie Mannix. The men conversed and drank beer

together near Mannix's truck. Mannix bought two six-packs of beer with a ten dollar bill. Rep.'s Tr. ("RT") at 2218-19, 2222-23. Later, Mannix bought more beer. RT at 2227.

About 9:00 p.m., police officers stopped Mannix's truck, McHargue was driving, and Roy, Mannix and Clark were inside. Mannix was wearing a western-style vest with long straps and knee-high leather moccasins. RT at 2042, 2392. There were two backpacks in the truck. RT at 2043, 2393. The officers saw the four men again at the liquor store before 11:00 p.m. RT at 2050, 2088, 2396.

About 11:15 p.m., Marie Koehler Smart saw two men standing by the side of the truck which was in a ditch. Smart spoke to McHargue while the other man stood near her car. RT at 2471. McHargue told Smart that they had already called for help. RT at 2473. As Smart turned to depart, she

saw another person laying on the ground by the side of the truck; the person appeared to be injured but was moving. RT at 2474-75. Smart saw McHargue and the other man walk back to where the man was lying and stand over him. RT at 2476.

Police arrived about 1:30 a.m. RT at 2050-51, 2054, 2061, 2096. They found skid marks measuring approximately 50-100 feet behind the truck. RT at 2077-78, 2635. Clark's body was lying across the ditch, on his back. RT at 2057-58, 2404-05. Clark was fully clothed, his shirt was unbuttoned, he was wet and muddy, had no vital signs, and had a puncture wound in the middle of his chest. RT at 2058, 3283. Mannix's body was found under the truck, submerged in water; his clothing except for his pants had been removed, his pants were pulled down to his knees, and his moccasins were gone. RT at 2063-64, 2406-07.

There was about twelve inches of water in the ditch. RT at 2621, 2632. The truck was about five and a half feet above the water in the ditch. RT at 2626. There were scattered papers and a wallet, containing Mannix's drivers license and one dollar, in the brush near the truck. RT at 2628, 2637, 2645. The papers were dry. RT at 3305. A dime lay near Clark's body. RT at 2630-31.

About 3:00 p.m., officers found McHargue and Roy at a restaurant. RT at 2069, 2071-72, 2094. They had been there for two hours. RT at 2968-69. Both men had buck knives. RT at 2072-73, 2501. Roy's pant legs were wet from the calf down. RT at 2285-86. McHargue's pants were completely wet from the knees down, possibly from the waist down, and his shoes were muddy. RT at 2448-49, 2450. McHargue's backpack was very wet and contained Mannix's brown knee-high moccasins and a

brown vest with long straps which were soaking wet. RT at 2424-25, 2451.

Roy first denied he was with Mannix and Clark when the truck went into the ditch. RT at 2173. An officer noticed that Roy's backpack was wet and muddy and its contents were wet. RT at 2176. Roy then admitted that he and McHargue were with Mannix and Clark at the accident scene. RT at 2293. Roy stated that McHargue was driving the truck, lost control on Block Road, went into a ditch and wrecked the truck. RT at 2179-81, 2293. Roy stated that he and Clark climbed out of the passenger window, went through the ditch onto the bank, that Clark was jumping up and down on the embankment and shouting, and that Clark struck Roy in the chest and stomach. RT at 2181-82, 2293. Roy stated that he removed his buck knife, stabbed Clark once in the chest because Clark was attacking him, Clark fell on

his back, and Toy then told Clark "he was sorry he had to do that." RT at 2182-83, 2194. Roy stated that he then went to where McHargue was standing and saw that Mannix was in the ditch. RT at 2183-84. Roy did not know how Mannix got into the ditch, did not know what Mannix and McHargue had been doing, and denied being involved in the altercation with Mannix. RT at 2184, 2294-95, 2303. Roy denied taking anything from Clark or Mannix. RT at 2302. Roy stated that he and McHargue then walked back into town. RT at 2302. Among Roy's possessions, police found $170.53 cash and Mannix's wristwatch. RT at 2309-10, 2666-68.

One of the pockets on Clark's pants was turned inside out. RT 2690. Clark died from a stab wound to his heart. RT at 2696.

Mannix suffered multiple scratches on his body and several stab wounds. RT at 2699-2700, 2711.

Mannix was stabbed once in the left chest through the heart, once in the abdomen, and five times above his left hip and on the hip. RT at 2700, 2711-13. Mannix also drowned. RT at 2701. Either the drowning by itself or the stab would by itself could have killed Mannix. RT at 2701.

The stab wounds found on Mannix and Clark were consistent with the buck knives taken from Roy and McHargue, however, a pathologist could not determine which knife inflicted which wounds. RT at 2725-26, 2730.

Williams Hudspeth met Roy while the two were confined at the Butte County Jail. RT at 3084. Hudspeth testified that Roy said that when he and McHargue arrived in Gridley they wanted to sell blood in order to get some money because neither had money. RT at 3091. Roy said that he and McHargue planned to rob the men they were drinking beer with

in Gridley and take their truck and Roy mentioned that they would have to "take them out, meaning Archie Mannix and the other person in the pickup." RT at 3123-24. Hudspeth explained that to take someone out means to kill them. RT at 3126. Roy said that he and McHargue took the younger man out and that he was the "easy one," then they worked on the bigger man who McHargue was having a hard time with. RT at 3126-27. Roy said that he stabbed the bigger man in the lower part of the body and, because he was not sure if he was dead, Roy and McHargue shoved his head in the water; after that Roy and McHargue left in the truck. RT at 3127, 3135-36. Roy said he and McHargue took the two men's money, between $150 and $160, some clothes, and a vest Roy wanted. RT at 3128-29. Hudspeth also stated that Roy said the pickup truck was stuck off the side of the road, so he and McHargue started walking

back towards town when another vehicle picked them up. RT at 3133.

Joy Hudspeth, William Hudspeth's wide, testified that she received letters from William Hudspeth, who was in the state prison system, discussing his forthcoming testimony and stating "Can you imagine on the stand I have to look at him. I've got to kill a guy. That hurts. Hope he gets double life instead. Very hard. What I'm going through." RT at 3510, 3512-15, 3536. Hudspeth also stated "I hope Mattly comes through for me on his promise." RT at 3537. The district attorney's name was Mattly. RT at 1. Hudspeth subsequently testified in rebuttal that the "promise" referred to was to be taken out of the California State prison system into another state prison for his safety. RT at 4508. Hudspeth testified that state prisoners who testify jeopardize their safety. RT at 4508-09. Hudspeth hoped that Mattly could get

him a job. RT at 4512. Hudspeth testified that Mattly never made him any promises to get him to testify. RT at 4509.

Sidney Hall also met Roy while the two were confined at the Butte County Jail. RT at 3196. Hall testified Roy said that when he arrived in Gridley he had a little money. RT at 3214. Roy said that Clark and Mannix were mad because the truck was wrecked and that Clark hit Roy in the head with a stick. RT at 3200-01, 3217. Roy said that he killed Clark by stabbing him with a buck knife. RT at 3200-01, 3259. Roy said that McHargue and Mannix were fighting, that McHargue was "getting the worst end of it," and that Roy went over to help McHargue. RT at 3203. Roy did not say how he helped McHargue with Mannix. RT at 3203. Roy said that Mannix had to die because he was a witness and that he was stabbed and drowned, but Roy later retracted the statement

and said that it was not so. RT at 3203-04. Roy never said that he stabbed Mannix. RT at 3266. Roy said that after the deaths, McHargue took a vest and some high-top moccasins, and Roy and McHargue walked back to Gridley. RT at 3218-19. Roy also said that he did not take anything from Clark or Mannix. RT at 3240, 3258.

A criminalist tested Roy's buck knife and found ABO type A blood near the base of the blade. RT at 2908-09. Mannix was ABO type A and Clark was AB0 type O. RT at 2807-10, 2910-11. The criminalist could not determine that the type A blood found on Roy's knife was Mannix's blood. RT at 2963. A forensic serologist performed a blood test on blood taken from Roy and determined that Roy is ABO type A. RT at 3764.

A psychologist opined that Roy has "borderline intellectual functioning or borderline

intellectual retardation," and "substantial and significant brain damage or neurological impairment." RT at 3576-77, 3642-43. A board certified psychiatrist testified that Roy did not have the capacity to form a clear and deliberate intent to kill a human being on September 14, 1981. RT at 4279-80. He also opined that Roy did not have a normal capacity to weigh and consider the question of killing a human being. RT 4281.

A psychiatrist testified that neither psychiatrist nor psychologists have the expertise to decide whether an individual is capable of forming the intent to kill. RT at 4426.

Discussion

Roy contends that the trial court's failure to instruct the jury that intent is an element of aiding an abetting was harmful constitutional error because it relieved the state of its burden of proving all elements

of the offense beyond a reasonable doubt. Roy also contends that the omission resulted in an unconstitutional directed verdict against Roy, depriving him of a jury trial upon an element of the offense charged.[2]

Due Process protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime

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2. See Martinez v. Borg, 937 F.2 422, 424 (9th Cir. 1991) ("In Carella [v. California] . . . Justice Scalia reasoned traditional harmless error analysis is inappropriate in the context of incomplete jury instructions because it substitutes the appellate court's findings of fact for the jury's and is akin to an impermissible directed verdict.") Respondents contend that Roy's claim that the trial court directed a verdict in violation of his right to a jury trial is unexhausted. Answer at 30. Roy's habeas petition to the California Supreme Court, attached to respondent's answer as Exhibit K, makes it clear, however, that Roy has exhausted his direct verdict claim. See Ex. K at 5, 8. Roy contends that an instructional error omitting an essential element cannot be harmless because it results in a directed verdict, depriving a defendant of a jury trial. The Ninth Circuit has rejected this per se approach, however. Hennessy v. Goldsmith, 929 F.2d at 514-16 & n. 3. In Hennessy, the Ninth Circuit noted that in Rose v. Clark, 478 U.S. 570, 578, 106 S.Ct. 3101, 3106 (1986), the Supreme court "distinguished instructional error from a directed verdict against a criminal defendant; in the latter instance 'harmless-error analysis presumably would not apply.'" Hennessy, 929 F.2d at 515. The Ninth Circuit found, however, that Rose did not equate failure to instruct the jury on every element with a directed verdict, and instead broadly applied harmless error analysis.

with which he is charged. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970). Failure to properly instruct a jury regarding an element[3] of a charged crime is a constitutional error that deprives the defendant of due process unless the error is harmless. Hennessy v. Goldsmith, 929 F.2d 511, 514 (9th Cir. 1991).

The jury was instructed that "[a] person aids and abets the commission of a crime if with [1] knowledge of the unlawful purpose of the perpetrator of the crime he [2] aids, promotes, encourages or instigates by act or advice the commission of such crime." RT at 5780.

After Roy's trial, but before his conviction became final, the California Supreme Court held that when the defendant's intent is ambiguous, an

3. The substantive elements of a criminal offense are defined by state law. See Jackson v. Virginia, 443 U.S. 307, 324 n.16, 99 S.Ct. 2781, 2792 n.16 (1979).

aiding and abetting conviction requires "proof that an aider and abettor rendered aid with an intent or purpose of either committing, or of encouraging or facilitating commission of, the target offense. People v. Beeman, 35 Cal.3d at 551.

In Beeman, the defendant was convicted of aiding and abetting robbery upon the testimony of others that he was extensively involved in planning the crime, drew a floor plan of the scene, and possessed part of the loot. Beeman testified that two days before the robbery, he told the others that he wanted nothing to do with it and that he furnished the floor plan for an innocent purpose. The jury was instructed that a person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator of the crime, he aids, promotes, encourages or instigates by act or advice the commission of such crime. The California Supreme

Court held that an aider and abettor must act with knowledge of the perpetrator's criminal purpose and intent; otherwise conviction is allowed if the defendant, knowing of the perpetrator's unlawful purpose, negligently or accidentally aided the crime.

The United States Court of Appeals for the Ninth Circuit has held that "Beeman" error is constitutional error when it precludes the jury from finding each element of the crime beyond a reasonable doubt. Martinez v. Borg, 937 F.2d 422, 423 (9th Cir. 1991).[4] In that case, the defendant was convicted of aiding and abetting the second degree murder of one

4. The error is harmless, however, if no rational jury would have made its findings without also finding that the defendant had the specific intent to aid the crimes committed by the perpetrator. Martinez, 937 F.2d at 423, 424. Yates v. Evatt, 111 S.Ct. 1884 (1991), involved a mandatory rebuttable presumption that shifted the burden to the defendant. Yates requires weighing the probative force of the evidence considered by the jury, in accordance with the instruction, as against the probative force of the presumption standing alone. 111 S.Ct. at 1893. Yates has no application to a case involving Beeman error, where an element of the offense is omitted. See Martinez, 937 F.2d at 424. If an instruction omits an element, a court cannot weigh the evidence considered by the jury in accordance with the omitted element.

peace officer and of the attempted murder of another. The evidence was that the murder weapon was usually carried by defendant but that the perpetrator suddenly shot the officers from a car window at point-blank range. The court found that the jury could have found that defendant aided the murder by supplying the murder weapon without necessarily finding that appellant intended the gun to be used to kill the officers. Because the court could not determine that the jury necessarily found specific intent in order to reach its verdict, the instruction omission was not harmless. Id. at 425-26.

Absence of a Beeman instruction, however, does not necessarily remove the issue of intent from the jury's consideration. Only when the defendant's act is not intended, e.g., it is involuntary, or if the defendant, intending the act, did not know that it would aid the perpetrator's criminal venture, is

the Beeman instruction required.[5] That was the case in Martinez but it is not the case here.

McHargue and Roy hitchhiked to Gridley. Mannix paid for beer and owned a truck. McHargue and another man were seen standing over a shirtless, living, wounded man. Roy admitted stabbing Clark. Mannix's shirtless body was found submerged in water under his truck. Mannix died either from being stabbed or drowned. Mannix's wallet was found with one dollar in it. Upon his arrest, Roy's pants were wet from the calf down. Police found $170 and Mannix's wristwatch among Roy's possessions. Roy at first denied being with Mannix and Clark when the truck went into the ditch but then admitted being there. Roy told Hall that he "helped" McHargue when

5. See Hart v. Stagner, 935 F.2d 1012-13 (Beeman error harmless when defense was not lack of intent, but that Hart was not present during crimes); Cf. Martinez, 937 F.2d at 425 n.2; Willard v. California, 812 F.2d 461, 646 (9th Cir. 1987) (Beeman error harmless where intent is not a live issue at trial).

McHargue and Mannix were fighting. Type A blood was found on Roy's knife; Roy and Mannix had type A blood. Hudspeth testified that Roy admitted a plan to rob Clark and Mannix and admitted robbing both. Hall testified that Roy admitted helping McHargue with Mannix.

Roy did not argue that he did not intend to aid and abet McHargue. Roy's statement to the police was that he did not know how Mannix got into the ditch, did not know what Mannix and McHargue had been doing, and denied being in the altercation with Mannix. RT at 2184, 2294-95, 2303. Defense counsel argued that Mannix received dollar bills in change for the beer, that Roy did not have any dollar bills in his wallet, that there was no evidence the money in Roy's wallet came from Mannix or Clark, that Roy earned that money, that McHargue gave the wristwatch to Roy after McHargue killed Mannix, and

that Roy did not have Mannix's keys. RT at 5695-5700, 5709-10.

The record shows that the jury could not have reached its verdict of aiding and abetting without also finding that Roy had specific intent to aid and abet the robbery of Mannix; i.e., that Roy knew the full extent of McHargue's criminal purpose to rob Mannix, and Roy gave aid or encouragement with the intent or purpose of facilitating McHargue's commission of the crime. See Beeman, 35 Cal.3d at 560.

There is no ambiguity here as there was in Martinez and the instruction given did not remove the issue of intent from the jury's consideration or result in a directed verdict.

Roy contends that intent was a live issue because of expert testimony on Roy's mental limitations, his lack of capacity to form the requisite

intent for murder, and because Roy tendered a diminished capacity defense.[6] However, the jury convicted Roy of the second degree murder of Clark. In California, second degree murder requires proof of malice aforethought and is a specific intent crime. Cal. Penal Code §§ 187-189; People v. Gorshen, 51 Cal.2d 716, 732 (1959). The jury was instructed that if Roy's mental capacity was diminished--from mental illness, mental defect, intoxication or other cause--to the extent that there was a reasonable doubt whether Roy was able to form the mental states constituting either express or implied malice aforethought, the jury could not find him guilty of second degree murder. RT at 5797-98. Because the jury convicted Roy of the

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6. For crimes committed before 1982, (see People v. Smith, 34 Cal.3d 251 (1983), People v. Velez, 175 Cal.App.3d 785, 792 n.7 (1985), People v. McCoy, 150 Cal.App.3d 705 (1984)), California law provided that "evidence of diminished mental capacity, whether caused by intoxication, trauma, or disease, can be used to show that a defendant did not have a specific mental state essential to an offense." People v. Conley, 64 Cal. 2d 310, 316 (1966); see People v. Saille, 54 Cal.3d 1103 (1991).

second degree murder of Clark, they necessarily rejected Roy's diminished capacity defense.

I find that there was no federal constitutional error in the trial court's jury instructions. Accordingly, it is

RECOMMENDED that the petition for a writ of habeas corpus be denied.

These findings and recommendations are submitted to the Honorable David F. Levi pursuant to 28 U.S.C. § 636(b)(1)(C). Any party may file written objections to these findings and recommendations pursuant to Fed. R. Civ. P. 72(b) and L.R. 305(b) within ten days after service.

Dated: Mar -4 1993.

/s/
UNITED STATES MAGISTRATE JUDGE

APPENDIX F

ORDER DENYING WRIT OF HABEAS CORPUS

S012052

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

IN RE KENNETH ROY

ON

HABEAS CORPUS

Petition for writ of habeas corpus DENIED.

SUPREME COURT
FILED NOV. 21, 1989
Robert Wandruff, Clerk
Deputy

/s/
Chief Justice

APPENDIX G

IN THE

COURT OF APPEAL OF
THE STATE OF CALIFORNIA

IN AND FOR THE

THIRD APPELLATE DISTRICT

PEOPLE OF THE STATE
OF CALIFORNIA
Plaintiff and Respondent

vs.

3 Crim. C000992
Butte 76386

KENNETH DUANE ROY
Defendant and Appellant

REMITTITUR TO COUNTY CLERK

I, ROBERT L. LISTON, Clerk of the Court of Appeal of the State of California for the Third Appellate District, do hereby certify that the attached is a true and correct copy of the original opinion entered in the above entitled cause that has now become final.

WITNESS my hand and the seal of the Court affixed at my office this 9th day of May, 1989.

ROBERT L. LISTON, Clerk

By: /s/

SEAL Deputy

Receipt of the original remittitur in the above case is hereby acknowledged.

Dated: County Clerk

By:

Deputy

cc: see Mailing List

APPENDIX H

ORDER DENYING REVIEW

AFTER JUDGMENT BY
THE COURT OF APPEAL

3rd District, No. C000992

S009253

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

PEOPLE

v.

KENNETH DUANE ROY

Appellant's and Respondent's petitions for review DENIED. The request for an order directing depublication of the opinion in the above-entitled cause is DENIED.

/s/
Chief Justice

SUPREME COURT
Filed May 4, 1989
Robert Wandruff, Clerk
Deputy

APPENDIX I

IN THE

COURT OF APPEAL OF
THE STATE OF CALIFORNIA

IN AND FOR THE

THIRD APPELLATE DISTRICT

PEOPLE OF THE STATE
OF CALIFORNIA
Plaintiff and Respondent

vs.

3 Crim. C000992
Butte 76386

KENNETH DUANE ROY
Defendant and Appellant

By the Court:

Appellant's petition for rehearing is denied.

Dated: February 22, 1989

EVANS, Acting P.J.

- - - - - - - - - - - - by: /s/

cc: see Mailing List

FILED FEB 22 1989
COURT OF APPEAL - THIRD DISTRICT
Robert L. Liston, Clerk
Deputy

APPENDIX J

FILED JAN 27 1989
COURT OF APPEAL - THIRD DISTRICT
Robert L. Liston, Clerk
Deputy

(SEE DISSENTING OPINION)

CERTIFIED FOR PARTIAL PUBLICATION

THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

IN AND FOR THE THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,	)	C000992
	)	
Plaintiff and Respondent,	)	(Super. Ct.
	)	No. 76386)
v.	)	
	)	
KENNETH DUANE ROY,	)	
	)	
Defendant and Appellant.	)	

APPEAL from a judgment of the Superior Court of Butte County, Loyd H. Mulkey, Jr., Judge. Reversed in part, affirmed in part and remanded for resentencing or retrial.

Frank O. Bell, Jr., State Public Defender, under appointment by the Court of Appeal and Julia Cline Newcomb, Deputy State Public Defender, for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Robert D. Marshall and Cynthia G. Besemer, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Kenneth Roy was convicted of the first degree murder of Archie Mannix (Pen. Code, § 187[1]; count II) and his robbery (§ 211; count IV) after a jury trial and was found to have possessed but not to have used a knife during these offenses (§ 12022, subd. (b); counts II and IV). He was also convicted of the second degree murder of James Clark (§ 187; count I) and of personally using a knife during that killing (§ 12022, subd. (b)), but was acquitted of his robbery (§ 211; count III). The Mannix murder formed the basis of two special circumstances findings, (1) that it was committed during the commission of a robbery (§ 190.2, subd. (a)(17)(i); count II) and (2) that it was one of two offenses of murder in the first or second degree (§ 190.2,

1. Unless otherwise noted, all further references will be to the Penal Code.

subd. (a)(3); count II).[2] Penalties were imposed of life imprisonment without possibility of parole for the murder-robbery of Mannix (count II), 15 years to life for the murder of Clark (count I), plus a one-year enhancement for use of a weapon (count I), and five years for the Mannix robbery (count IV). Defendant appeals contending the court made instructional errors.

We shall strike the special circumstance findings and vacate the sentence predicated upon them. In all other respects we shall affirm the judgment. In the published portion of this opinion[3] we find the special circumstance findings infirm for the reason that the jury reasonably could have read the instructions, as given, argued and applied to the evidence, to authorize

2. Defendant was also charged with kidnapping Clark and Mannix for purposes of robbery (counts I and VI, § 209, subd. (b)) and robbing Clark (count III, § 211). Defendant's motion to strike the two kidnapping charges was granted October 26, 1983, and the jury found him not guilty of the robbery charge.

3. The Reporter of Decisions is directed to publish the opinion except for parts II and III of the Discussion.

the aggravated punishment for defendant on the ground he aided and abetted the robbery of Mannix, the natural and probable consequence of which was his killing by another (McHargue). That reading violates section 190.2, subdivision (b), which precludes imposition of the special circumstance for aiders and abettors of a felony murder who intend the commission of the felony but not the killing. (See People v. Anderson (1987) 43 Cal.3d 1104.) In the unpublished portion of the opinion we hold (a) it was harmless error to give CALJIC No. 3.01 (1980) as it preceded People v. Beeman (1984) 35 Cal.3d 547 and (b) it was harmless error to fail to give CALJIC No. 5.17 sua sponte relating to an honest but unreasonable belief in the necessity of self defense.[4]

4. Our dissenting colleague does not disagree with these holdings, although he feels it necessary to discuss them anyway, from his own vantage point, as part of "a homogenized discussion" of the issues tendered in the published portion of this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

On September 13, 1981, defendant and a friend, Jesse McHargue, were hitchhiking near Gridley. In Gridley, they went to a liquor store where they met the victims, Clark and Mannix. The men struck up a conversation and drank beer together near Mannix's truck.

At approximately 9 p.m. that evening, Gridley Police Officer Stan Massey saw Mannix's truck backing up near the liquor store, almost hitting a utility pole and some signs. He stopped the truck to talk to the driver, McHargue. The four men were occupants. Defendant and McHargue appeared to be sober, but neither had a driver's license. Because Mannix and Clark were visibly intoxicated, Officer Massey advised all four men not to drive. Massey noticed two backpacks in the bed of the truck.

At approximately 11:15 p.m. that same night, as Marie Koehler Smart drove through the intersection of Block Road and Evans-Reimer Road, near Gridley, she noticed two silhouettes and also saw a truck in the ditch. Smart turned her car around so it was heading south on Block Road and then stopped with her high beams illuminating the area where the truck was resting. She saw two men standing on the bank to the left side of the truck. When she asked if they needed help, the two men approached the car. One of the men, later identified as McHargue, went up to the car window and told Smart they had summoned help. As Smart made a U-turn to leave, she noticed a man lying on the ground to the left side of the truck at the location she had first observed McHargue and his companion. The man was shirtless and appeared to be hurt; he moved his hands "up towards his stomach, then back down." Smart saw McHargue and the other man

walk back over to where the man was lying and stand over him.

Early the next morning, officers found Mannix's truck "nosed" into a six-foot-deep ditch. Although there were 12 inches of water in the ditch, no part of the truck was submerged because both ends rested on the opposite walls of the steeply sloped ditch. The front end rested against the south bank. Fifty-feet-long skid marks were found on "Block Road south." Clark's body was found in an empty field on the south side of the ditch in front of the pickup. His clothing was wet and muddy. One of his pants pockets was turned inside out and his shirt was open. A dime was found about four feet from his foot. Mannix's body was found in the ditch partially under the truck. His body was partly submerged in the water. The only clothing remaining on his body was a pair of pants pulled down to his thighs. Both men had stab wounds.

Blood was found on the blackberry bushes on the embankment directly behind the truck above the spot where Mannix's body was discovered. A wallet and some papers were found scattered 10 to 15 feet down the road, east of the truck. The wallet and papers were dry. Mannix's shirt was later found in the ditch.

After the bodies were discovered, Officers Massey and Dustin commenced a search for defendant and McHargue and found them in a restaurant. Both men were carrying buck knives. McHargue's pants were completely wet, either from the thighs or the waist down. Defendant's pantlegs were wet to the calf. After they had been informed of their Miranda rights, defendant and McHargue authorized a search of their backpacks. In McHargue's backpack, Mannix's water-soaked moccasins and vest were found. Defendant's backpack and its contents were also wet.

Defendant at first denied being in the truck with Mannix and Clark, claiming he and McHargue left the two men at the liquor store. During questioning, he admitted being in the truck when McHargue lost control while making a turn. Defendant said that after he and Clark left the truck, Clark began hitting him; defendant then stabbed Clark once in the chest. Defendant said he then told Clark he "was sorry he had to do that." He retrieved his backpack and crossed the ditch to the place where McHargue was standing. At that point, he said, Mannix was already in the ditch.

After defendant's arrest, Mannix's watch was found among defendant's personal belongings. He also had $170 in his wallet.

The medical examiner testified that Clark died from a single stab wound to the chest and that Mannix had multiple stab wounds and scratches on his body and had drowned. Mannix was stabbed in the left

chest, in the upper left portion of his abdomen, and five times on his lower left flank. The cause of death was either the stab wound to the chest or the drowning. The examiner also testified that five wounds to the lower flank were inflicted after death.

Sidney Hall, a county jail inmate with defendant, testified that defendant told him Clark and Mannix "got mad" after McHargue wrecked the truck when he took a turn too quickly and ended up in the ditch. He admitted stabbing Clark after Clark hit him in the head with a stick. Defendant said that Mannix and McHargue were also fighting and, seeing that McHargue "was getting the worst of it," defendant went over to help him. Defendant did not say in what manner.[5]

Another jail inmate, William Hudspeth, testified that defendant admitted to him that he and

5. Hall said that defendant at one point told him Mannix had to die because he was a witness and that he was stabbed and drowned, but defendant later retracted the statement.

McHargue planned to rob and kill both Clark and Mannix, that they "went on with their plans" and killed Clark first because he was the "easy one." Defendant then assisted McHargue who was having a "hard time" with Mannix. Hudspeth testified that defendant admitted coming up from behind, stabbing Mannix in the lower part of the body, pulling him off McHargue, stabbing him again in the abdomen, and then shoving his head in the water to make certain he was dead. Defendant said that they took between $150 and $160 from the two men; as well as Mannix's vest. After the incident, they got in the pickup and left.

Evidence was presented by the prosecution that a small stain of dried blood found on the base of the blade of defendant's knife was ABO type A blood, matching that of Mannix's blood type. Clark's blood type is ABO type O.

The defense introduced evidence that defendant's blood type is also ABO type A. Defendant's witness, a forensic serologist, testified that if the antigens from the saliva or perspiration of an individual with one blood type are mixed with the blood of another, an incorrect reading of the blood type may result.

The jury returned verdicts as previously set forth.

DISCUSSION

I

The prosecution tendered alternative theories of criminal responsibility; that defendant was guilty of the first degree murders of both Mannix and Clark either because (a) the killings were premeditated or (b) they occurred during the commission of a robbery.

As to the first theory, the People argued that defendant and McHargue had a plan to take the two victims "out in the boonies, and to kill them, to rob

them, take their pickup and proceed north." Consistent with this plan, defendant pounded Clark to the ground, took money out of his pocket, and then thrust the knife in his chest. The district attorney theorized that, because McHargue was having difficulty with Mannix, defendant came to his assistance and inflicted the fatal thrust to Mannix's chest. According to the prosecutor, the evidence established that, based on the similarity between the fatal wounds to both victims, they were inflicted by the same person, i.e., defendant.

The prosecutor argued alternatively that the facts supported a finding of first degree murder under a felony murder theory. According to him, defendant and McHargue took Mannix and Clark out in the isolated area in order to rob them, as supported by the fact that defendant was found with $170 and Mannix's watch and McHargue with Mannix's vest and moccasins. He argued: "[I]f you find this . . . killing took place while the

perpetrator, the defendant . . . was committing a robbery, and intended to rob these people, that is to take their property, and permanently depreive [sic] the people of their property from their immediate possession by force or fear, and a killing resulted, that's also murder in the first degree."

It can be inferred that the jury found that defendant did not plan the murder or the robbery of either Clark or Mannix, since it returned a second degree murder verdict in the Clark killing and found defendant not guilty of the robbery charge with respect to Clark. It also can be inferred that the jury concluded that defendant did not kill Mannix by stabbing, since it found that defendant did not use a knife in connection with his murder. Accordingly, it can be inferred that the jury rejected the prosecutor's argument that defendant planned the robberies or killings. That left the felony murder argument as a likely candidate for the finding of

culpability. On this point the jury was instructed that defendant was responsible for the first degree felony murder of Mannix if he aided and abetted his robbery and was liable for the special circumstance if the murder occurred during the commission of the robbery.

The Mannix murder also formed the basis of two special circumstances findings; that it was committed during the commission of a robbery (§ 190.2, subd. (a)(17)(i)) and that it was one of two murders in the first or second degree (§ 190.2, subd. (a)(3)). The jury was not given instructions which distinguished between the scienter required for findings of felony murder and special circumstance. If the jury found, pursuant to the instructions, that defendant was guilty of the felony murder of Mannix on the theory he aided and abetted the robbery of which the Mannix killing was an unintentional but natural and reasonable or probable consequence, it is inconceivable that it separately found

that defendant intended that McHargue kill Mannix, a finding necessary, as we shall show, to the valid imposition of a special circumstance penalty.

For reasons which we next detail, we will conclude that the jury reasonably could have been led by instructional error to fuse the standards of criminal responsibility and liability for the special circumstance resulting in improper special circumstances findings.

A.

People v. Anderson, supra, 43 Cal.3d at pp. 1138-1148, upholding Carlos v. Superior Court (1983) 35 Cal.3d 131 on this point[6], holds that "[t]he court must

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6. The same standard applies where the special circumstance is predicated upon dual murders. The Penal Code provides that a special circumstance may be found where defendant "has in this proceeding been convicted of more than one offense of murder in the first or second degree." (§ 190.2, subd. (a)(3).) At least one of the offenses must be murder in the first degree. Anderson holds that in such a case the aider and abetter must intend the killing of the victim in (at least) one of the multiple murders and that must be a first degree murder, as specified in section 190.2, subdivision (b) (and the special circumstance instruction given here). (43 Cal.3d at pp. 1149-1150.) Here, there is only one first degree murder. Accordingly, the instructional defect which attends that finding must also infect the multiple murder special circumstance finding.

instruct on intent to kill as an element of the felony-murder special circumstance when there is evidence from which the jury could find (see People v. Flannel (1985) 25 Cal.3d 668, 684-685 [160 Cal.Rptr. 84, 603 P.2d 1]) that the defendant was an aider and abetter rather than the actual killer." (Anderson, supra, 43 Cal.3d at p. 1147.)

The jury was not so instructed. The special circumstance instruction given here, CALJIC No. 8.80 (1981), preceded the 1984 revision (CALJIC No. 8.80), which, following Carlos, supra, explicitly now provides that the accomplice must have "intended to aid in the killing of a human being . . . ." (Emphasis added.) Rather, the jury was instructed in terms which invited the fusion of the distinct standards of guilt and special circumstance. That could occur because the guilt and special circumstance issues are tried simultaneously (§

190.1, subd. (a)) on the same evidence (§ 190.4, subd. (a)).

The jury was given an original and amended version of the instruction on the standards to be applied in determining defendant's liability for the special circumstance arising from the Mannix murder. The jury was told in the instruction read to it that "[i]f you find the defendant in this case guilty of a willful, deliberate, premeditated murder of the first degree, you must then determine if murder was committed" [inter alia] [i]n the commission of a robbery." (Emphasis added.) If that restriction had been allowed to remain, the issue here considered would have been foreclosed. However, the jury instruction was amended after the reading.

In the instructions sent to the jury room, the premeditation restriction was deleted and the jury was told that: "If you find the defendant . . . guilty of

murder of the first degree, you must then determine if murder was committed . . . in the commission of a robbery and/or [he] was convicted . . . of more than one offense of murder in the first or second degree.

" . . . . . .

If . . . Roy, was not the actual killer, it must be proved beyond a reasonable doubt that he intentionally aided, abetted . . . the actual killer in the commission of the murder in the first degree before you are permitted to find the alleged special circumstance of that first degree murder to be true . . . ." (CALJIC No. 8.80 (1981), emphasis added.) "[T]he murder in the first degree" refers to the Mannix murder and, in the circumstances of this case, necessarily encompasses the felony murder theory of culpability.

The reason for the modification is that the district attorney, Mr. Mattly, wished the instruction to be amended to include the felony murder theory of

culpability. This is revealed in the colloquy which followed the reading of the instruction to the jury in the unamended form. "The Court: This was their [the defendant's] instruction? [¶] Mr. Mattly: Yes. So all you need to do is you can give this [amended] one, send it in [to the jury in printed form] but all you need to do is this: 'If you find the defendant in this case guilty' what you would do is you would strike, I think, 'of a willful, deliberate, premeditated murder.'" The court then said: "That is to be included as it is now modified by you gentlemen in the instructions to be delivered to the jury? [¶] Mr. Kenkel: Yes. [¶] Mr. Mattly: Yes." That was done. The modified form, showing the striking of the "willful" language appears in the record. From these events it is clear that the prosecution was pursuing a felony murder theory and the jury was unmistakably informed by the change in instructions that premeditation

was not required for the imposition of the special circumstance.

That was emphasized by a second (unamended) instruction which provided: "To find that the special circumstance, referred to in these instructions as murder in the commission of robbery, is true, it must be proved: [1.] That the murder was committed while the defendant was engaged in or was an accomplice in the commission of a robbery. [¶] 2. That the murder was committed in order to carry out or advance the commission of the crime of robbery . . . . In other words, the special circumstance referred to . . . is not established if the . . . robbery was merely incidental to the commission of the murder." (CALJIC No. 8.81.17 (1980).) The fusion of guilt and penalty theories was further emphasized by two other instructions which told the jury, in identical words with respect to guilt and penalty instructions, first, that "first degree felony murder

based on robbery . . . is not established if the robbery was merely incidental to the commission of any homicide" and, second, that "the special circumstance . . . is not established if the . . . robbery was merely incidental to the commission of the murder." These instructions place the relationship of the robbery to the killing in the identical posture for purposes of culpability, under a felony murder theory, and penalty as a special ciscumstance.

To expand on this point, the first instruction (as amended) refers to "the murder of the first degree," i.e., the Mannix murder, and informs the jury that if it finds defendant guilty of that murder it must determine whether it "was committed . . . in the commission of a robbery and [that]

" . . . . . .

[i]f defendant . . . was not the actual killer, it must be proved . . . that he intentionally aided, abetted . . . the

actual killer in the commission of [that] murder . . . ." The second instruction tells the jury that if the murder was "in the commission of robbery" "it must be proved [inter alia] the defendant . . . was an accomplice in the commission of a robbery." (Emphasis added.) The words "aided, abetted" and "accomplice" are not defined in the special circumstance instructions. The definitions of these terms are to be found only in the instructions on the issue of guilt.

There, the jury was instructed that "[i]f a human being is killed by any one of several persons engaged in the perpetration of, or attempt to perpetrate, the crime of robbery, all persons who . . . with knowledge of the unlawful purpose of the perpetrator of the crime aid . . . its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental." (CALJIC No. 8.27 (1979), emphasis added.) It was also instructed that the

"unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs as a result of the commission of or attempt to commit the crime of robbery, and where there was in the mind of the perpetrator the specific intent to commit such crime, is murder of the first degree." (CALJIC No. 8.21.) The jury was further instructed that "[o]ne who aids and abets is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but he is also liable for the natural and reasonable or probable consequences of any act that he knowingly aided or encouraged." (CALJIC No. 3.00 (amended by CALJIC No. 4.25.) These instructions made clear that the aider and abettor of a felony murder need not intend the killing.

It bears repetition that the jury was instructed on the relationship of the Mannix murder to the Mannix robbery in identical terms in both the guilt

and penalty instructions, that "first degree felony murder based on robbery . . . is not established if the robbery was merely incidental to the commission of any homicide" and that "the special circumstance . . . is not established if the . . . robbery was merely incidental to the commission of the murder."

In sum, the jury was told that it could find defendant guilty of the first degree felony murder of Mannix if he intended his act of assistance to aid the robbery and the killing was the natural and probable product of the robbery, whether he intended that result or not. It was also told that if <u>that</u> murder were committed in the commission of a robbery a special circumstance finding is warranted. By any account of the instructions, a concrete link was forged between the guilt and special circumstance instructions. Indeed it is inconceivable that the jury, having found defendant guilty of the first degree murder of Mannix on the theory that

it unintentionally resulted from an intended robbe
would not have concluded that the murder occurr
during the commission of a robbery, justifying t
imposition of the special circumstance.

The explicit fusion of guilt and pena
instructions permits, indeed invites, the violation of
standard set down in People v. Anderson, supra.

B.

A contrary conclusion is suggested by
recent case of People v. Warren (1988) 45 Cal.3d
It held that the trial court did not have to instruct
jury that the accomplice must intend the killing beca
"all the evidence shows that the defendant either actu
killed the victim or was not involved in the crime a
. . . ." (Id., at p. 487.)

Notwithstanding this dispositive holding
court in dictum went on to say that the instructio
special circumstances correctly stated the law and w

not have misled a reasonable jury into believing that an intent to rob sufficed for the special circumstance. That instruction provided that the jury could impose the special circumstance if "'the defendant was . . . a person who intentionally aided, abetted . . . the actual killer in the commission of murder in the first degree.'" (Warren, 45 Cal.3d at p. 487.) The court observed that "in the context of this case the challenged instructions might conceivably be construed in a different manner. In delivering its charge the court defined first degree felony murder: 'The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs as a result of the commission of . . . the crime of robbery, and where there was in the mind of the perpetrator the specific intent to commit the crime of robbery, is murder of the first degree.'" (Ibid.) The court concluded, however, that "the instructions . . . would not be so construed by a reasonable juror [for] one could

understand the charge as requiring an intent to rob and nothing more only if [a jury] parsed it in a hypertechnical manner." (Id., at p. 488.) We are not told in what manner the jury would correctly "parse" the instruction. We are told that the court was convinced that the jury would not have linked the standards for guilt and special circumstance.

However, that was said in the context of a case in which "all the evidence shows that the defendant either actually killed the victim or was not involved in the crime at all . . . ." (45 Cal.3d at p. 487.) Accordingly, there was no factual predicate by which to reach the issue of reasonableness nor to determine whether the jury could have made the linkage on the facts of the case. That circumstance led three concurring justices to remark that the observation by the majority opinion is dictum. (Id., at p. 490.) Dictum is not

binding as a holding. (See, e.g., People v. Milner (1988) 45 Cal.3d 227, 237.)

In any event, Warren is distinguishable on its facts and instructions. The sole, generalized instruction on the standards for the special circumstance finding considered in Warren did not explicitly link the criteria for that determination to the standards for the felony murder. In this case, the linkage is explicitly made in the instructions. That linkage is supported by the evidence adduced and the manner in which the case was argued and presented to the jury.

C.

Based on the evidence presented to it, the jury could reasonably have inferred that two simultaneous fights ensued following the wreck of Mannix's truck by McHargue; defendant fought Clark while McHargue fought Mannix. The jury could have found that the lower part of defendant's pants became wet when he got

out of the truck, when he fought with Clark, and/or when he crossed back across the ditch after killing Clark. The jury could have inferred that Mannix was injured, possibly fatally, but still alive when defendant came over to the location of the Mannix/McHargue altercation. The jury may have believed that at that point defendant either personally robbed Mannix of some of his personal possessions or assisted McHargue in his taking of Mannix's property. It is a further permissible inference from the evidence that McHargue then either dragged Mannix to the ditch and drowned him or that Mannix was able to muster up his last bit of strength and continued to fight McHargue in the ditch. The fact that McHargue's pants were wet up to his thighs or waist would support a conclusion that McHargue personally drowned Mannix. The finding by the jury that defendant did not use a knife during the commission of the offense against Mannix reveals that the jury rejected the theory

that defendant inflicted the fatal stab wounds on Mannix. Thus, it is reasonable to conclude that the jury inferred that defendant's only participation in the offenses relating to Mannix was his taking of Mannix's personal property while he was still alive or his assistance in McHargue's taking of the property.

D.

That leads us to consider whether the instructional error was harmless.

As we have observed, Anderson holds that "[t]he court must instruct on intent to kill as an element of the felony-murder special circumstance when there is evidence from which the jury could find (see People v. Flannel (1985) 25 Cal.3d 668, 684-685 [160 Cal.Rptr. 84, 603 P.2d 1]) that the defendant was an aider and abettor rather than the actual killer." (Anderson, supra, 43 Cal.3d at p. 1147.) This applies to both felony murder

and multiple murder grounds of special circumstance. (See Anderson, supra, at pp. 1147 and 1149-1150.)

Until recently the California Supreme Court has had no occasion to discuss the standard for harmless error applicable to a failure to give the intent instruction required by Anderson. That is so because in each case in which the issue was tendered the court determined that the instruction was not required because the issue of aiding and abetting was not before the jury. This determination was variously founded (a), as in People v. Anderson, supra, on the ground there was no evidence warranting a finding that the defendant was an aider and abettor of a felony murder (See People v. Hamilton (1988) 45 Cal.3d 351, 363-364 and People v. Warren, supra, 45 Cal.3d at p. 487; People v. Coleman (1988) 46 Cal.3d 749, 779; (b) it was undisputed or conceded or uncontradicted that the defendant was the actual killer (See People v. Babbitt (1988) 45 Cal.3d 660, 708; People

v. Keenan (1988) 46 Cal.3d 478, 503; People v. McDowell (1988) 46 Cal.3d 551, 566); (c) the issue did not arise because the jury was not instructed on an aider and abettor theory (People v. Melton (1988) 44 Cal.3d 713, 747, fn. 12; see also People v. Bunyard (1988) 45 Cal.3d 1189, 1241); and (d) the jury returned a special verdict that the killing was premeditated. (See People v. Miranda (1987) 44 Cal.3d 57, 89; People v. Boyde (1988) 46 Cal.3d 212, 243.)

However, these cases do imply that if there is evidence from which the jury could permissibly have inferred that the defendant was an aider and abettor of the felony murder the Anderson instruction is mandatory. That is the apparent holding of People v. Garrison (Jan. 5, 1989, S004354) ___ Cal.3d ___. It held that because "there was evidence from which a jury could have based its verdict on an accomplice theory, the court erred in failing to instruct that the jury must find that defendant

intended to aid another in the killing of a human being." (Id., at p. ___ [typed opn. pp. 59-60; fn. omitted.)

Garrison held that such an error is subject to the Chapman standard of harmless error, relying upon People v. Odle (1988) 45 Cal.3d 386, 410-415. Under Chapman v. California (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711], "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." That standard cannot be satisfied, i.e., such a belief cannot be declared, where, as in this case, an inference can be drawn from the record that the jury found that the defendant was liable for the special circumstance on the ground that he intentionally aided a robbery but did not intend the killing that occurred during its commission. If the jury could have made such a finding it (obviously) cannot be said that the error (the

failure to preclude such a possibility by a correct instruction) was harmless beyond a reasonable doubt.

In Garrison the court concluded that the error was harmless on the theory that "the failure to instruct on intent was necessarily resolved adversely to defendant under other, properly given instructions. (See People v. Sedeno [1974] 10 Cal.3d 703.)" (___ Cal.3d at _____ [typed opn. pp. 60-61].) "In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant since the evidence that would support a finding that only [in this case] the lesser offense was committed has been rejected by the jury." (Sedeno, supra, at p. 721.) In other words, it cannot be said, viewed from the vantage point of all of the instructions given and the evidence adduced, that the jury could have

drawn an adverse inference from the erroneous instruction.

As we have shown in great detail, that is not the case here. Considering all of the instructions the jury could have drawn the conclusion that defendant was liable for the special circumstance on the theory he aided and abetted the Mannix robbery without intending that Mannix be killed.

Accordingly, the special circumstance findings must be reversed.

II

Defendant next argues that reversible error resulted from the giving of CALJIC Nos. 3.00[7], 3.01[8],

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7. CALJIC No. 3.00 includes as principals in a crime: "Those who, with knowledge of the unlawful purpose of the person who directly and actively commits or attempts to commit the crime, aid and abet in its commission or attempted commission."

8. CALJIC No. 3.01 (1980), as given here reads: "A person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator of the crime, he aids, promotes, encourages or instigates by act or advice the

and 8.27,[9] jury instruction relating to the theory that he aided and abetted the robbery of Mannix Those instructions implicate not only the robbery conviction but also the first degree murder conviction to the extent it was based on a felony murder theory. Citing People v. Beeman (1984) 35 Cal.3d 547, defendant contends the instructions failed to explicitly inform the jury that the offense of aiding and abetting requires an intent to facilitate the criminal offense aided. He argues that this error compels reversal because the intent issue was completely removed from the jury's consideration.

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commission of such crime."

See Footnote 9 next page.

9. CALJIC No. 8.27 (1979), as given reads: "If a human being is killed by any one of several persons engaged in the perpetration of, or attempt to perpetrate, the crime of robbery, all persons who either directly and actively commit the act constituting such crime or who with knowledge of the unlawful purpose of the perpetrator of the crime aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental."

We agree that the challenged instructions do not include, as suggested in People v. Beeman, supra, a clause making explicit the requirement that an aider and abettor must have an intent to facilitate or encourage the offense committed by the perpetrator.[10] (Beeman, supra, 35 Cal.3d at p. 561.) However, as we shall explain, the jury instructions as given could not have misled the jury to defendant's prejudice. (Chapman v. California, supra, 386 US. at p. 24 [17 L.Ed.2d at pp. 710-711]; see People v. Dyer (1988) 45 Cal.3d 26, 59-64.)

The absence of the explicit Beeman clause does not necessarily result in the removal of intent from jury consideration, such as when intent is not put in issue, is conceded, or is covered by other instructions.

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10. Beeman suggests, as an appropriate instruction, "that a person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (Beeman, supra, 35 Cal.3d at p. 561.)

(People v. Garcia (1984) 36 Cal.3d 539; see also People v. Ramos (1984) 37 Cal.3d 136, 146-147; People v. Caldwell (1984) 36 Cal.3d 210, 223-224; People v. Allen (1985) 165 Cal.App.3d 616, 628-629.) Moreover, as we recently discussed in People v. Rogers (1985) 172 Cal.App.3d 502, as applied to the facts of a particular case, the instruction found wanting in Beeman (CALJIC No. 3.01 [1980]) and given here, may convey the required intent to the jury because in the circumstances of the case it contains a legally adequate criterion of intent. That is the case here.

As we explained in Rogers, supra, the defect in CALJIC No. 3.01 exposed by Beeman is the "failure to ambiguously articulate the requirement that the defendant simultaneously know both the perpetrator's unlawful purpose and that his act of aid would facilitate that purpose." (Rogers, supra, 172 Cal.App.3d at p. 509.) Borrowing the phrase from People v. Patrick

(1981) 126 Cal.App.3d 952, 967, we referred to this dual knowledge as "'knowing aid.'" We stated that ambiguities in the instruction "are significant if the defendant's act was not intended (e.g., f it were involuntary) or if the defendant, intending the act, did not know that it would aid the perpetrator's criminal venture." (Ibid.; in. omitted; emphasis in original.) As we next explain, as in Rogers, neither of these conditions is tendered in his case.

"That someone knowingly aided a criminal offense is ordinarily descriptive of an intention to achieve that which the actor knows will be achieved by his act of aid. Indeed, if a defendant testifies that he knowingly aided the perpetrator of a crime, the question immediately arises, what else could the defendant say or show that would dissuade us from believing that it was his intent to facilitate the offense? At the least this circumstance calls for an explanation which would defeat

the intention thus ascribed. Although the defendant has no formal burden of defeasance, he is at risk of a conviction if, in this circumstance, he does not raise a reasonable doubt of his intent by the production of evidence negating the ascribed intention. [Citation] [¶] . . . [T]he appropriateness of knowing aid as a criterion of intent, and hence (absent its circumstantial ambiguities) the appropriateness of CALJIC No. 3.01, is dependent upon the facts of the case. CALJIC No. 3.01 [1980] conveys the required intent unless a contrary inference of intent is a material issue in this case." (Rogers, supra, at p. 512.)

We set forth in Rogers examples of what counts as a material issue of contrary intent. In such cases the evidence defeases the intent ordinarily conveyed by knowing aid. In Hicks v. U.S. (1893) 150 U.S. 442 [37 L.Ed 1137], an instruction required the jury to conclude from the mere utterance of words that had

the effect of encouraging the perpetrator to commit an offense, that the utterer intended them to be understood as such. In that case, the defendant had testified that his words were intended to dissuade the perpetrator. The jury instruction thus prevented the jury from considering the defendant's testimony and thus removed the issue of intention.

People v. Bolanger (1886) 71 Cal. 17 presents a second example of evidence defeasing the intent of knowing aid. In that case, a witness challenged as an accomplice stated that he intended to participate in the larceny charged against the perpetrator but had feigned complicity for the purpose of defecting thieves. His defense was that he intended to frustrate the criminal purpose notwithstanding knowledgeable aid. In such circumstances the ordinary inference cannot be derived from such a criterion.

Beeman, supra, 35 Cal.3d 547, presents another example. Beeman admitted that he aided his friends' commission of a robbery and was aware of their perpetration. He testified, however, that he did not believe that they would go through with it and did not want to be involved, thus attempting to negate the intent embedded in the conjunction of his acts of aid and his awareness of the criminal venture. (See also People v. Yarber (1979) 90 Cal.App.3d 895 [where an act of oral copulation by female defendant on male defendant was followed by an act of oral copulation of male defendant by minor, Mary S. the jury should have been specifically instructed of the requirement that the female defendant had the purpose of aiding the perpetrator in the section 288a offense; the court noted that her act of oral copulation was subject to two equally strong inferences, one of which was that she did the act for her own

purposes without regard for whether Mary S. followed suit].)

We turn to the evidence in the present case and consider the factual possibilities in order to determine whether the alleged instructional error could have prejudiced defendant. The first possible scenario is defendant's version that Clark started the fight with him and he ultimately responded by stabbing Clark. He then crossed over to where McHargue was standing. At that point, defendant claimed, Mannix was already in the ditch. Defendant's version could not have satisfied the requirements under CALJIC No. 3.01 as given, i.e., that an aider and abettor have knowledge of the perpetrator's unlawful purpose and aid in the commission of the crime. Based on the instructions given, it is clear the jury rejected defendant's version of the events. A second factual scenario is one presented by the prosecutor. Under one of his theories, defendant and McHargue

took Mannix and Clark out to an isolated area to kill them and rob them. Inmate Hudspeth testified that defendant told him that he and McHargue planned to kill and rob both men and that after defendant killed Clark he assisted McHargue, stabbing Mannix twice. Because the jury returned a second degree murder verdict as to Clark, found defendant not guilty of the robbery of Clark, and found defendant did not personally use a knife with respect to Mannix, the jury could not have believed the facts to be such. They disbelieved Hudspeth's testimony.[11]

A third factual candidate is that supporting the felony-murder theory. According to the testimony of eyewitness Marie Koehler Smart, defendant and

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11. The only argument presented from which the jury might conclude that defendant's fight with Clark itself served as the assistance to McHargue (in that it allowed McHargue to rob Mannix without interference from Clark) was that defendant and McHargue planned to rob and kill the two men before they went to the isolated area. The jury's second degree murder verdict with respect to Clark and the not guilty verdict with respect to the Clark robbery count show that the jury did not believe this theory.

McHargue were both standing on the ditch bank over the obviously injured Mannix. Inmate Hall testified that defendant said that after stabbing Clark he went over to assist McHargue who was fighting with Mannix. The manner of assistance was not revealed.[12] The jury was instructed that in order to find defendant guilty as an aider and abettor of the robbery, it had to find defendant (1) had knowledge of the unlawful purpose of the perpetrator and (2) aided, promoted, encouraged, etc. the commission of the crime. No evidence was present to counter an intent to facilitate the offense, i.e., to show that defendant did not so intend. Thus, the intent conveyed by knowing aid was not defeased. As we said in Rogers, supra, 172 Cal.App.3d at p. 514, "It would be absurd to say that [one defendant] knowingly contributed to the force and fear imposed by [the other

12. To the extent the jury believed defendant personally robbed Mannix, the aiding and abetting instructions are not implicated and therefore could not have prejudiced defendant.

defendant] upon the victim in the course of the robbery but is not culpable as an aider and abettor of the robbery." Under the circumstances of this case, the assistance to McHargue by defendant in the perpetration of the robbery, with defendant's knowledge of McHargue's purpose, unambiguously reveals defendant's awareness of the importance of his acts in advancing the robbery. In other absence of evidence establishing some contrary intent, no other inference is permissible from the act.

Thus, under these facts, as in Rogers, supra, "CALJIC No. 3.01 (1980) adequately conveyed the required element of intention to the jury." (Rogers, supra, at p. 514.) Consequently, defendant could not have been prejudiced by the giving of the instructions challenged here.

III

Defendant next contends that the court committed prejudicial error by failing sua sponte to give CALJIC No. 5.17 which defines an honest but reasonable belief in the necessity to defend oneself[13] and that, as a consequence, the second degree murder conviction of Clark must be reversed. We disagree.

"'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the

13. CALJIC No. 5.17 provides: "A person who kills another person in the honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury kills unlawfully, but does not harbor malice aforethought and cannot be found guilty of murder. This would be so even though a reasonable man in the same situation seeing and knowing the same facts would not have had the same belief. Such an honest but unreasonable belief is not a defense to the crime of [voluntary [or] [involuntary] manslaughter."

case.' [Citation.]" (People v. Wickersham (1982) 32 Cal.3d 307, 323.) In People v. Flannel, supra, 25 Cal.3d at pp. 682-683, the court held that the unreasonable belief rule does not invoke such a general principle and that the instruction should be given if the other requirements for a sua sponte instruction are met. However, "the duty to give instructions, sua sponte. . . . arises only it if appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (People v. Sedeno, supra 10 Cal.3d at p. 716.)

Under the facts of this case, the court should have given CALJIC No. 5.17 and erred in failing to do so. However, the error was harmless, because "the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions." (Sedeno, 10 Cal.3d at

p. 721.) The jury was adequately instructed that an honest but unreasonable belief in self-defense can negate malice by the court's reading of CALJIC No. 8.40[14] (voluntary manslaughter - defined) and No. 8.50. CALJIC No. 8.50 provides: "The distinction between murder and manslaughter is that murder requires malice while manslaughter does not. [¶] When the act causing the death, though unlawful, is done [in the heat of passion or is excited by a sudden quarrel such as amounts to adequate provocation] [in the honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury the offense is manslaughter. In such a case, even if an intent to kill

14. CALJIC No. 8.40 (1979) provides: "The crime of voluntary manslaughter is the unlawful killing of a human being without malice aforethought when there is an intent to kill. [¶] There is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion, [or] [in the honest but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury]. [¶] In order to prove the commission of the crime of voluntary manslaughter, each of the following elements must be proved: 1. That a human being was killed, 2. That the killing was unlawful, and 3. That the killing was done with the intent to kill."

exists, the law is that malice, which is an essential element of murder, is absent. [¶] To establish that a killing is murder and not manslaughter, the burden is on the state to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the [heat of passion or upon a sudden quarrel] [in the honest, even though unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury]." The jury, having found defendant guilty of second degree murder, obviously rejected the manslaughter theory and thereby found that he did not act pursuant to an honest, but unreasonable belief in the necessity to defend himself.

Disposition

The judgment of sentence predicated upon the special circumstance findings is reversed. The judgment is affirmed in all other respects. The case is remanded for resentencing or retrial on the issue of

special circumstances at the option of the prosecuting attorney. (CERTIFIED FOR PARTIAL PUBLICATION.)

BLEASE, J.

I concur:

SIMS, J.

I respectfully dissent; my dissent is directed to the published portion of the opinion only. However, my view of the entire case requires a homogenized discussion of the separate issues. I do concur, as will be discerned from the following discussion, with the balance of the majority opinion on the issues there addressed.

The majority and I differ on the meaning and effect of five recent Supreme Court decisions dealing with Beeman[1]-type error (People v. Anderson (1987) 43 Cal.3d 1104, 1138-1148; People v. Dyer (1988) 45 Cal.3d 26, 59-65; People v. Odle (1988) 45 Cal.3d 386, 410-416; People v. Warren (1988) 45 Cal.3d 471, 486-488; People v. Keenan (1988) 46 Cal.3d 478, 503-504). The effect of the majority opinion would effectively circumvent the clear import of People v. Anderson in overruling the decision of Carlos v. Superior Court (1983) 35 Cal.3d 131, and to ignore the clear and unambiguous statement

1. People v. Beeman (1984) 35 Cal.3d 547.

that the use of former CALJIC No. 3.01 which contains the Beeman-type error is to be treated as Chapman error.[2] (People v. Dyer, supra, at pp. 59-65.)

In addressing the issues specifically raised by the defendant in this dissent, I will illustrate what I believe to be an attempt by the majority opinion, particularly in its published portion, to obfuscate the clear meaning of the cited Supreme Court decisions, supra, and their application to a case such as this, in which the absence of an instruction on specific intent to kill in the felony-murder circumstance by an aider and abettor is asserted as reversible error.

I

Defendant contends the court committed prejudicial error by failing to sua sponte give CALJIC No. 5.17 which defines an honest but unreasonable belief

2. Chapman v. California (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711].

in the necessity to defend,[3] and that as a consequence, the second degree murder conviction (Clark) must be reversed. I disagree.

"'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' [Citation.]" (People v. Wickersham (1982) 32 Cal.3d 307, 323.)

The Supreme Court in People v. Flannel (1979) 25 Cal.3d 668, 682-683, held that the

3. CALJIC NO. 5.17 (5th ed. 1988) provides: "A person, who kills another person in the honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully, but does not harbor malice aforethought and cannot be found guilty of murder. This would be so even though a reasonable man in the same situation seeing and knowing the same facts would not have had the same belief. Such an honest but unreasonable belief is not a defense to the crime of [voluntary] [or] [involuntary] manslaughter."

unreasonable belief rule should be considered a general principle for purposes of jury instruction, and in cases not yet tried, the court should give the instruction sua sponte if the other requirements for such an instruction are met. "[T]he duty to give instructions, sua sponte, . . . arises only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (People v. Sedeno (1974) 10 Cal.3d 703, 716.)

Under the facts of this case, the court should have given CALJIC No. 5.17 and erred in failing to do so. However, the error was harmless, because "the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions." (Sedeno, supra, 10 Cal.3d at p. 721.) The jury was adequately instructed that an honest but unreasonable belief in self-defense

can negate malice by the court's reading of CALJIC Nos. 8.40 (1979 Re-revision)[4] (voluntary manslaughter - defined) and 8.50 (1980 Revision). CALJIC No. 8.50 provides: "The distinction between murder and manslaughter is that murder requires malice while manslaughter does not. [¶] When the act causing the death, though unlawful, is done [in the heat of passion or is excited by a sudden quarrel such as amounts to adequate provocation] [in the honest but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury] the offense is manslaughter. In such a case, even if an intent to kill exists, the law is

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4. CALJIC No. 8.40 provides: "The crime of voluntary manslaughter is the unlawful killing of a human being without malice aforethought when there is an intent to kill. [¶] There is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion, [or] [in the honest but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury]. [¶] In order to prove the commission of the crime of voluntary manslaughter, each of the following elements must be proved: [¶] 1. That a human being was killed, [¶] 2. That the killing was unlawful, and [¶] 3. That the killing was done with the intent to kill."

that malice, which is an essential element of murder, is absent. [¶] To establish that a killing is murder and not manslaughter, the burden is on the state to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the [heat of passion or upon a sudden quarrel] [in the honest, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury]." Under the circumstances, the jury obviously found that defendant did not act pursuant to an honest, but unreasonable belief in the necessity to defend, and found him guilty of murder in the second degree.

II

Defendant argues the court committed reversible error by utilizing former CALJIC Nos. 3.00, 3.01, and 8.27. He cites to People v. Beeman, supra, 35 Cal.3d 547, and contends he was denied due process because the jury was not informed that to find him guilty

as an aider and abettor they must find that he specifically intended to encourage or facilitate the criminal act. He also argues the court erred by failing to instruct the jury that they must find intent to kill in order to find him guilty of felony murder.

He grounds his contentions on Carlos v. Superior Court, supra, 35 Cal.3d 131, which has recently been overruled by People v. Anderson, supra, 43 Cal.3d 1104. Anderson holds "intent to kill is not an element of the felony-murder special circumstance [§ 190.2, subd. (a)(17)]; but when the defendant is an aider and abetter rather than the actual killer, intent must be proved." (Pp. 1138-1139.) Accordingly, I conclude that to the extent the jury found defendant to have been the actual killer of Archie Mannix, it was not required, before finding true the felony-murder special circumstance, that defendant intended to kill Mannix.[5] To the extent the

5. Similarly, the multiple-murder special circumstance finding is not infirm. (See People v. Anderson, supra, 43 Cal.3d at p. 1149

jury found defendant to have been an aider and abetter rather than the actual killer, however, I believe the jury, contrary to defendant's assertion, was properly instructed that it had to find defendant intended to kill, as follows: "If defendant Kenneth Duane Roy was not the actual killer, it must be proved beyond a reasonable doubt that he intentionally aided, abetted, counseled, commanded, induced, solicited, requested or assisted the actual killer in the commission of the murder in the first degree before you are permitted to find the alleged special circumstance of that first degree murder to be true as to the defendant Kenneth Duane Roy." This instruction is in the language of section 190.2, subdivision (b), which Anderson found unambiguous on the point: "Section 190.2(b) . . . declares that the felony-murder aider and abetter is eligible for the death penalty [or for life

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[overruling People v. Turner (1984) 37 Cal.3d 302, to the extent it holds intent to kill is an element of the multiple-murder special circumstance].)

imprisonment without the possibility of parole] if intent to kill is proved. . . . [G]iven realistic reading the statutory requirement that the aider and abetter intentionally aid, abet, counsel, command, induce, solicit, request, or assist any acts in the commission of first degree murder -- even when applied to felony murder -- is not ambiguous: the aider and abetter must intentionally aid in a killing." (43 Cal.3d at p. 1145, emphasis in original.) I would find no error in the special circumstance instructions given in this case.

Moreover, since People v. Garcia (1984) 36 Cal.3d 539, and People v. Anderson, supra, 43 Cal.3d 1104, the California Supreme Court, in a series of cases involving use of former CALJIC No. 3.01, as modified, in accordance with People v. Yarber (1979) 90 Cal.App.3d 895, has held that Beeman-type error is to be treated as Chapman error. (See People v. Dyer, supra, 45 Cal.3d at pp. 59-65; People v. Odle, supra, 45 Cal.3d

at pp. 410-416; People v. Warren, supra, 45 Cal.3d at pp. 486-488; People v. Keenan, supra, 46 Cal.3d at pp. 503-504.) The Chapman test is whether we can determine beyond a reasonable doubt that the error did not affect the verdict. Here, defendant argues the trial court erred in instructing the jury based on CALJIC Nos. 3.01, 3.00, and 8.27, claiming the error withheld the intent to kill issue from the jury and thus required setting aside its findings and convictions of second degree murder against Clark and first degree murder against Mannix.

Defendant claims he had no intent to kill either Clark or Mannix; that he was defending himself against Clark. The jury obviously rejected that defense and convicted him of second degree murder. Implicit in the jury's verdict is a finding that defendant had the intent to kill. The jury also resolved the intent issue adversely to defendant on the first degree murder

conviction of Mannix. In addition to the instructions on the intent to kill, the court also read the instruction on aiding and abetting. Although the latter instruction contained the Beeman flaw, it informed the jury that defendant's state of mind was relevant to the aiding an abetting question. Former CALJIC No. 3.01 provides, "A person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator of the crime, he aids, promotes, encourages or instigates by act or advice the commission of such crime. . . ." (Emphasis added.) The issue raised encompasses Beeman-type error, that is, whether on the whole record the court is convinced beyond a reasonable doubt that it is not reasonably possible the jury would have not found intent by the defendant to kill Mannix either as the actual killer or as an aider and abetter. Applying the Chapman standard, I would conclude the evidence in this instance compels the conclusion that the

instructional errors were harmless beyond a reasonable doubt.

Concerning the murder of Archie Mannix for which defendant was convicted of murder in the first degree, the defense was denial, putting the People to their proof. A stab wound to the heart and drowning were concurrent causes of Mannix's death. The jury verdict that, as to the murder of Mannix, the defendant was armed with but did not personally use a knife necessarily implies that, if the jury believed the defendant was the actual killer, he killed Mannix by drowning. If the jury believed defendant was not the actual killer, the verdict implies he aided and abetted his partner, McHargue, in the stabbing and/or the drowning. In either event, the evidence shows overwhelmingly defendant's intent to cause Mannix's death.

Additionally, Sidney Hall was an inmate with defendant at Butte County jail. Hall testified that

defendant admitted killing Clark (the other murder victim) after Clark had hit him over the head with a stick. McHargue and Mannix were fighting. McHargue was "getting the worst end of it," so defendant went to his aid. Defendant told Hall "that Mannix had to die because he was a witness, and that he was stabbed and drowned -- held under the water." Defendant also told Hall that a woman drove by and stopped. McHargue went to talk to her, but defendant "was too far away and he didn't think she could identify him at all." Defendant later denied to Hall any involvement in Mannix's killing.[6]

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6. William Hudspeth, another inmate at the jail with defendant, also testified for the People. He testified that defendant admitted his and McHargue's plan to rob and kill both Clark and Mannix. He also admitted to Hudspeth that he had stabbed Mannix. Hudspeth's testimony should be disregarded, however, because the jury obviously disbelieved it. The verdict of second degree murder as to Clark, as well as the acquittal of the charge of robbery as to Clark, reflects the jury's belief that there was no "plan" to rob and kill him. Further, the finding that, as to Mannix, defendant did not personally use a knife reflects the jury's belief that defendant was not the person who actually inflicted the knife wounds.

The woman who drove by and stopped was Marie Smart. She was driving by the scene and observed a truck in a ditch and two silhouettes. She stopped, with her car's headlights, which were on high beam, shining directly onto the truck. To the left side of the truck she observed two men standing. She asked if they needed any help, and they both approached the car. One of the men, later identified as McHargue, went to Smart's car window and told her they had already summoned help. (Smart was unable to identify defendant as the second man, who had approached to about two feet from the car but did not come to the window.) As she turned her car around to leave, Smart noticed a man lying on the ground, to the left side of the truck and at the location she first observed McHargue and the other man standing. The man lying on the ground was shirtless and appeared to he hurt, moving his hands up toward his stomach and back down again. As Smart was leaving the

scene, McHargue and the other man returned to their original positions, standing over the apparently disabled man on the ground and doing nothing. When Mannix's body was discovered by authorities, his torso was bare.[7]

Dr. Pierce Rooney, a forensic pathologist, testified that Mannix had suffered a nonfatal stab wound to his abdomen. Mannix had also suffered a mortal stab wound to his heart and considerable drowning, each of which was a cause of Mannix's death. Death from the type of stab wound to the heart suffered by Mannix would, in the ordinary case, occur within a few minutes if not instantaneously.

Defendant and McHargue were eventually detained for questioning. Defendant did not respond when informed that Clark and Mannix had been discovered, dead. Defendant initially denied being with

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7. Smart's testimony, coming as it did from a disinterested witness, must have been most damaging. Indeed, during deliberation, hers was the only testimony the jury requested to be read back.

them when the truck ran into the ditch. But when informed that his story did not jibe with McHargue's, defendant admitted he and McHargue were with Clark and Mannix when the truck ran into the ditch. Defendant admitted stabbing Clark after Clark had allegedly struck defendant. Defendant denied any knowledge about what happened to Mannix, stating only that when he (defendant) turned around after stabbing Clark, Mannix was already in the ditch.[8] Defendant said he and McHargue then walked back to town After giving his statement, defendant was arrested. Among the items found in defendant's possession were a watch with dried blood and dirt on it and a key ring with six keys, both of which items were identified as Mannix's. Defendant also had a wallet containing $170.5[illegible]. One week before the homicide, Mannix was observed with a

8. Defendant also told Dr. Globus, the defense psychiatrist, that he was aware Mannix had ended up dead in the ditch, but defendant denied actually killing him.

large sum of money in his wallet, including tens and hundreds. Mannix's wallet and scattered documents, but no money, were found near his body.

Applying the Chapman test, the recited evidence from the record demonstrates to me, beyond a reasonable doubt, that the Beeman error could not have affected the verdict. (See People v. Dyer, supra, 45 Cal.3d at pp. 64-65; see also People v. Garrison (Jan. 5, 1989, S004354) ___ Cal.3d ___, ___ [typed opn. pp. 33-25].)

I would affirm the judgment. (CERTIFIED FOR PUBLICATION.)

EVANS, Acting P.J.

APPENDIX K

UNITED STATES CONSTITUTION

FIFTH AMENDMENT

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

SIXTH AMENDMENT

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

FOURTEENTH AMENDMENT

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX L

CONSTITUTION OF
THE STATE OF CALIFORNIA

ARTICLE VI, SECTION 13

"No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

APPENDIX M

CALIFORNIA PENAL CODE

SECTION 31

"**Who are principals.** All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed." [Enacted 1872.]

SECTION 187

"**Murder defined**. (a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

"(b) This section shall not apply to any person who commits an act which results in the death of a fetus if any of the following apply:

"(1) The act compiled with the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code.

"(2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although

not medically certain, would be substantially certain or more likely than not.

"(3) The act was solicited, aided, abetted, or consented to by the mother of the fetus.

"(c) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law." [As amended by Stats. 1970, ch. 1311, § 1.]

SECTION 189

"[**Degrees of murder.**] All murder which is perpetrated by means of a destructive device or explosive, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree.

"As used in this section "destructive device" shall mean any destructive device as defined in Section 12301, and "explosive" shall mean any explosive as defined in Section 12000 of the Health and Safety Code."
[As amended by Stats. 1970, ch. 771, § 3.]

SECTION 190.2, SUBDIVISIONS (a)(3) and ()(17)(i)

"[**Mandatory penalty upon special findings.**] (a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true

"(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.

"(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies

"(i) Robbery in violation of Section 211."
(Subdivisions (a) 1, 2, 4-16, (17)(ii-ix), 18, 19 and (b) have been omitted.) [As adopted by initiative November 7, 1978.]

SECTION 211

"**Robbery defined**. Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."
[Enacted 1872]

SECTION 12022, SUBDIVISION (b)

"(b) Any person who personally uses a deadly or dangerous weapon in the commission or attempted commission of a felony shall, upon conviction of such felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he has been convicted, be punished by an additional term of one year, unless use of a deadly or dangerous weapon is an element of the offense of which he was convicted."
[As amended by Stats. 1977, ch. 165, § 91, effective June 29, 1977.]

APPENDIX N

CALIFORNIA JURY INSTRUCTIONS -
CRIMINAL (CALJIC)

(Written instructions as given in this case with brackets, deletions, corrections, etc., omitted.)

2.01 (CT 801)

"However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proven circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.

"Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.

"Also, if the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, it is your duty to adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt.

"If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, it would be your duty to accept the reasonable interpretation and to reject the unreasonable."

/s/
Judge of the Superior Court

2.02 (CT 794)

"The specific intent or mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. But you may not find the defendant guilty of the offense charged in Counts I, II, III and IV, unless the proved circumstances not only are consistent with the theory that he had the required specific intent or mental state but cannot be reconciled with any other rational conclusion.

"Also, if the evidence as to any such specific intent or mental state is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to the absence of the specific intent or mental state, it is your duty to adopt that interpretation which points to the absence of the specific intent or mental state. If, on the other hand, one interpretation of the evidence as to such specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, it would be your duty to accept the reasonable interpretation and to reject the unreasonable."

/s/

3.00 (CT 824)

"The person concerned in the commission or attempted commission of a crime who are regarded by law as principals in the crime thus committed or attempted and equally guilty thereof include:

"1. Those who directly and actively commit or attempt to commit the act constituting the crime, or

"2. Those who, with knowledge of the unlawful purpose of the person who directly and actively commits or attempts to commit the crime, aid and abet in its commission or attempted commission.

"One who aids and abets is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but he is also liable for the natural and reasonable or probable consequences of any act that he knowingly aided or encouraged.

"If the evidence shows that the defendant was intoxicated at the time of the alleged offense, the jury should consider his state of intoxication in determining if defendant had such knowledge.

"If from all the evidence you have a reasonable doubt whether defendant had such knowledge by reason of a state of intoxication, you must give the defendant the benefit of that doubt and find that he did not have such knowledge."

/s/
Judge

3.01 (CT 826)

"A person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator of the crime, he aids, promotes, encourages or instigates by act or advice the commission of such crime.

"Mere presence at the scene of the crime which does act itself assist the commission of the crime does not amount to aiding and abetting.

"Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting."

/s/
Judge of the Superior Court

3.31 (CT 828)

"In each of the crimes charged in Counts I, II, III, and IV, of the information, namely, murder and robbery there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator and unless such specific intent exists the crime to which it relates is not committed.

"The specific intent required is included in the definitions of the crimes charged."

/s/

3.34 (CT 829)

"The intent with which an act is done is shown as follows:

"By the circumstances attending the act, the manner in which it is done, the means used, and the soundness of mind and discretion of the person committing the act."

/s/
Judge of the Superior Court

5.30 (CT 838)

It is lawful for a person who is being" assaulted to defend himself from attack if, as a reasonable person, he has grounds for believing and does believe that bodily injury is about to the inflicted upon him. In doing so he may use all force and means which he believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent."

/s/
Judge of the Superior Court

8.21 (CT 851)

"The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs as a result of the commission of or attempt to commit the crime of robbery, and where there was in the mind of the perpetrator of the specific intent to commit such crime, is murder of the first degree.

"The specific intent to commit robbery and the commission or attempt to commit such crime must be proved beyond a reasonable doubt."

s/
Judge of the Superior Court

8.27 (CT 853)

"If a human being is killed by any one of several persons engaged in the perpetration of, or attempt to perpetrate, the crime of robbery, all persons who either directly and actively commit the act constituting such crime or who with knowledge of the unlawful purpose of the perpetrator of the crime aid, promote, encourage, or instigate by act or advice whether the killing is intentional, unintentional, or accidental."

s/
Judge of the Superior Court

8.77 (CT 872-873)

"If you find from the evidenc that at the time the alleged crime was committed,the d fendant had substantially reduced mental capacity, wheth r caused by mental illness, mental defect, if any, thi diminished capacity had on the defendant's ability to orm any of the specific mental states that are essentia elements of murder and voluntary manslaughter.

"Thus, if you find that the defendant's mental capacity was diminished to the ex nt that you have a reasonable doubt whether he did, aturely and meaningfully, premeditate, deliberate, anc to kill, you cannot find him guilty of a wilful, d berate and premeditated murder of the first degree.

"Also, if you find that th defendant's mental capacity was diminished to the ex nt that you have a reasonable doubt whether he was ble to form the mental states constituting either expr s or implied malice aforethought, you cannot find m guilty of murder of either the first or second degre

"If you have a reasonab doubt (1) whether he was able to form an intention unlawfully to kill a human being, or (2) whether he was aware of the duty imposed on him not to commit acts which involve the risk of grave injury or death, or (3) whether he did act despite that awareness, you cannot find that he harbored express malice.

"Further, if you have reason le doubt (1) whether his acts were done for a ba , anti-social purpose, or (2) whether he was aware of the duty imposed on him not to commit acts whi involve the risk of grave injury or death, or (3) whe r he did act despite that awareness, you cannot find th he harbored implied malice.

"Furthermore, if you find th as a result of mental illness, mental defect, or intoxicat n, his mental capacity was diminished to the extent t t he neither harbored malice aforethought nor had an tent to kill at the time the alleged crime was committ , you cannot find him guilty of either murder or voluntary manslaughter."

/s/

8.79 (CT 874)

"Before the defendant may be found guilty of the unlawful killing of a human being as a result of the commission or attempt to commit the crime of robbery, you must take all the evidence into consideration and determine therefrom if, at the time of the commission or attempt to commit such crime, the defendant was suffering from some abnormal mental or physical condition, intent to commit such crime.

"If from all the evidence you have a reasonable doubt whether the defendant was capable of forming such specific intent, you must give the defendant the benefit of that doubt and find that he did not have such specific intent."

/s/

8.80 (CT 875-876)

"If you find the defendant in this case guilty of murder of the first degree, you must then determine if murder was committed under one or more of the following special circumstances: in the commission of a robbery and/or the defendant was convicted in this case of more than one offense of murder in the first or second degree.

"A special circumstance must be proved beyond a reasonable doubt.

"If you have a reasonable doubt as to whether a special circumstance is true, it is your duty to find that it is not true.

"If defendant Kenneth Duane Roy, was not the actual killer, it must be proved beyond a reasonable doubt that he intentionally aided, abetted, counseled, commanded, induced, solicited, requested or assisted the actual killer in the commission of the murder in the first degree before you are permitted to find the alleged special circumstance of that first degree murder to be true as to defendant, Kenneth Duane Roy.

"You must decide separately each special circumstance charged in this case. If you cannot agree upon your finding as to all of the special circumstances but can agree as to one or more of them, you must make your finding as to the one or more upon which you do agree.

"In order to find the special circumstance charged in this case to be true or untrue, you must agree unanimously.

"You will include in your verdict on a form that will be supplied your finding as to whether the special circumstance is or is not true."

/s/

8.81.17 (CT 878)

"To find that the special circumstance, referred to in these instructions as murder in the commission of robbery, is true, it must be proved:

"1a. That the murder was committed while the defendant was engaged in or was an accomplice in the commission of a robbery.

"2. That the murder was committed in order to carry out or advance the commission of the crime of robbery or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the attempted robbery was merely incidental to the commission of the murder."

/s/
Judge of the Superior Court

8.83 (CT 879)

"You are not permitted to find the special circumstances charged in this case to be true based on circumstantial evidence unless the proved facts are not only (1) consistent with the theory that the special circumstances are true, but (2) cannot be reconciled with any other rational conclusion. Each fact which is essential to complete a set of facts necessary to establish the truth of the special circumstances must be proved beyond a reasonable doubt.

"Also, if the circumstantial evidence is susceptible of two reasonable interpretations, one of which points to the truth of the special circumstances and the other to their untruth, it is your duty to adopt the interpretation which points to their untruth, and reject the interpretation which points to their truth. If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, it would be your duty to accept the reasonable interpretation and to reject the unreasonable."

/s/
Judge of the Superior Court

8.83.1 (CT 880)

"The mental state with which an act is done may be manifested by the facts surrounding its commission. You may not find the special circumstances charged in this case to be true unless the proved facts not only are consistent with the theory that the defendant had the required mental state but cannot be reconciled with any other rational conclusion.

"Also, if the evidence as to the required mental state is susceptible of two reasonable interpretations, one of which points to the existence thereof and the other to the absence thereof, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the required mental state appears to you to be reasonable and the other interpretation to be unreasonable, it would be your duty to accept the reasonable interpretation and to reject the unreasonable."

/s/
Judge of the Superior Court

17.16 (CT 896)

"It is charged in Counts 1, 2, 3, and 4, that in the commission of the crime therein described, the defendant Kenneth Duane Roy personally used a deadly or dangerous weapon.

"A deadly or dangerous weapon means any weapon, instrument or object that is capable of being used to inflict great bodily injury or death.

"The term 'used a deadly or dangerous weapon,' as used in this instruction, means to display such a weapon in an intentionally menacing manner or intentionally to strike or hit a human being with it.

"If you find such defendant guilty of the crime thus charged, it then will be your duty to determine whether or not such defendant personally used a deadly or dangerous weapon in the commission of such crime.

"Such defendant may be found to have personally used a deadly or dangerous weapon at the time of the commission of the crime charged only if the proof shows beyond a reasonable doubt that such defendant personally used such a weapon at such time.

"You will include a finding on that question in your verdict, using a form that will be supplied for that purpose."

/s/
Judge of the Superior Court

"The written instructions now being given you will be made available in the jury room during your deliberations if you so request. They must not be defaced in any way.

"You will find that the instructions may be either printed, typewritten or handwritten. Some of the printed or typewritten instructions may be modified by typing or handwriting. Blanks in the printed instructions may be filled in by typing or handwriting. Also, portions of printed or typewritten instructions may have been deleted by lining out.

"You are not to be concerned with the reasons for any modifications that have been made. Also, you must disregard any deleted part of an instruction and not speculate either what it was or what is the reason for its deletion.

"Every part of an instruction whether it is printed, typed or handwritten is of equal importance. You are to be governed only by the instruction in its final wording whether printed, typed or handwritten."

/s/
Judge of the Superior Court

APPENDIX O

DECLARATION OF B.D. CHASTAIN

I, BARBARA DAWN CHASTAIN, declare as follows:

1. I am a Correctional Case Records Supervisor for the California Department of Corrections at the California State Prison at Folsom, Represa, California. I have been employed in this capacity since March 1988.

2. In my capacity as a Correctional Case Records Supervisor I am responsible for the supervision of staff which calculate release dates and conduct audits on inmate files within this facility.

3. The Second Amended Abstract of Judgment dated December 26, 1990, Butte County case number 76386, is the judgment under which Kenneth Duane Roy is currently incarcerated by the California Department of Corrections. However, based on the Department's calculations, the credits shown on the Abstract of Judgment are incorrect since those credits were previously applied at the time of the original sentencing (see attached letter dated 1-22-90 from this Department to Butte County Superior Court.)

I declare under penalty of perjury that to the best of my knowledge the foregoing is true and correct.

DATED: 7-5-91 /s/
BARBARA DAWN CHASTAIN

FOI

ABSTRACT OF JUDGMENT – PRISON COMMITMENT

FORM DSL 290

SUPERIOR COURT OF CALIFORNIA, COUNTY OF BUTTE

BRANCH

04100

PEOPLE OF THE STATE OF CALIFORNIA versus

DEFENDANT: KENNETH DUANE BOY

AKA:

CASE NUMBER(S): 36386

COMMITMENT TO STATE PRISON
ABSTRACT OF JUDGMENT

AMENDED ABSTRACT: 2nd

FILED
DEC 26 1990
CANDACE J. GRUBBS, Butte Co. Clerk
By K. NICHOLS, Deputy

08/27/90	2	LOYD H. MULKEY, JR.	K. Nichols
I. Miller	H. Harberts	J. Kenkel	T. Brown –

1.

A	PC	211	Robbery	83	11	08	83 XX		U		5

[redacted]

2.

[redacted]

3.

4.

5.

852 | 436

CLERK OF THE COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

K. Nichols

DATE: 12-26-90

ABSTRACT OF JUDGMENT – PRISON COMMITMENT
FORM DSL 290

THIS IS A CERTIFIED
COPY OF DOCUMENT IN FILE

B.D. Chastain
Prison Case Records Official

2

REPORT – INDETERMINATE SENTENCE, or OTHER SENTENCE CHOICE

FORM CR 291

SUPERIOR COURT OF CALIFORNIA, COUNTY OF BUTTE

0 4 1 0 0

PEOPLE OF THE STATE OF CALIFORNIA versus

DEFENDANT: KENNETH DUANE ROY

AKA:

CASE NUMBER(S): 76386

REPORT OF: ☐ DEATH SENTENCE ☒ INDETERMINATE SENTENCE ☐ OTHER SENTENCE CHOICE

AMENDED REPORT: 2nd ☒

FILED

DEC 26 1990

CANDACE J. GRUBBS, Butte Co. Clerk

By [illegible] Deputy

Date of hearing: 08/27/90	Dept. no.: 2	Judge: LOYD H. HUSKEY, JR.	Clerk: K. Nichols
Reporter: J. Miller	Counsel for people: H. Herberts	Counsel for defendant: J. Kenkel	Probation no. or probation officer: T. Brown

1. [illegible]

☐ [illegible]

Count	Code	Section number	Crime	Year	Date of conviction			Convicted by			
1	PC	187**	2nd Degree Murder	87	11	08	[illegible]	[illegible]			
[redacted]											
2	PC	187*	1st Degree Murder	8[illegible]	11	08	[illegible]				
[redacted]											

2. [illegible]

Count	Enhancement		Enhancement		Enhancement		Enhancement		Enhancement	
1	PC12022(b)									
[redacted]										
[redacted]										

3. [illegible]

Enhancement		Enhancement		Enhancement		Enhancement		Enhancement	
Enhancement		Enhancement		Enhancement		Enhancement		Enhancement	

4. ☐ [illegible]

5. ☒ [illegible]

A. ☒ For LIFE, [illegible] POSSIBILITY OF PAROLE on counts 1 and 2

B. ☐ For LIFE WITHOUT the possibility of [illegible]

C. ☐ [illegible]

6. ☐ [illegible]

7. ☐ [illegible]

A. (1) ☐ [illegible]

(2) ☐ [illegible]

B. [illegible] ☐ Jail Time ☐ Fine

8. ☐ Other disposition:

A. ☐ Defendant was committed to California Youth Authority.

B. ☐ Proceedings suspended, and defendant was committed to California Rehabilitation Center.

C. ☐ Proceedings suspended, and defendant was committed as a Mentally Disordered Sex Offender.

D. ☐ [illegible]

NOTE 1: PURSUANT TO ARTICLE VI, SECTION 6 OF THE CALIFORNIA CONSTITUTION [illegible]

NOTE 2: [illegible]

NOTE 3: [illegible]

[signature] 12-26-90

REPORT – INDETERMINATE SENTENCE

FORM CR 291

THIS IS A CERTIFIED COPY OF DOCUMENT IN FILE

B.D. Chadain

[illegible] Records Officer

3

No. 95-2025

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

THE PEOPLE OF THE STATE OF CALIFORNIA

and

DANIEL E. LUNGREN,
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Petitioners,

v.

KENNETH DUANE ROY, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* ON BRIEF IN OPPOSITION

Respondent Kenneth Duane Roy, through his counsel of record Hill C. Snellings, moves this Court for leave to proceed *in forma pauperis*. Leave to proceed *in forma pauperis* was sought and granted in the United States District Court for the Eastern District of California, and the case has proceeded *in forma pauperis* since that time.

Pursuant to 18 U.S.C. § 3006A of the Criminal Justice Act, the United States District Court appointed Mr. Hill C. Snellings

to represent respondent, and the United States Court of Appeals for the Ninth Circuit continued the appointment on appeal. Hence, pursuant to Rule 39.1 of the rules of this Court, no further affidavit or declaration in compliance with 28 U.S.C. § 1746 is required.

Dated: August 16, 1996

Respectfully submitted,

BLACKMON, DROZD & SNELLINGS

HILL C. SNELLINGS
Counsel of Record for Respondent Appointed Under Criminal Justice Act, 18 U.S.C. § 3006A
U.S. Bank Plaza
980 Ninth Street, Suite 2080
Sacramento, CA 95814
Telephone: (916) 441-0824

No. 95-2025

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

THE PEOPLE OF THE STATE OF CALIFORNIA

and

DANIEL E. LUNGREN,
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Petitioners,

v.

KENNETH DUANE ROY, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

BLACKMON, DROZD & SNELLINGS
HILL C. SNELLINGS
Counsel of Record for Respondent Appointed Under Criminal Justice Act, 18 U.S.C. § 3006A
U.S. Bank Plaza
980 Ninth Street, Suite 2080
Sacramento, California 95814
Telephone: (916) 441-0824

QUESTION PRESENTED

Respondent disagrees with petitioners' statement of the question presented by the decision below, and hence provides the following question.

1. Petitioners conceded below that the jury instructions erroneously omitted the specific intent element, but argued that the error was harmless. Did the court below correctly apply Brecht v. Abrahamson, 507 U.S. 619 (1993) and O'Neal v. McAninch, ___ U.S. ___, 115 S.Ct. 992 (1995) to the facts of Mr. Roy's case?

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JURISDICTION

THIS COURT LACKS JURISDICTION BECAUSE THE PETITIONERS WERE NOT PARTIES BELOW.

The petition for certiorari must be denied for lack of jurisdiction because the petitioners were not parties below. Pursuant to 28 U.S.C. § 1254, this Court may review cases in the courts of appeals by "writ of certiorari granted upon the petition of any party to any civil or criminal case . . . ." (Emphasis added.) However, the petitioners here -- the People of the State of California and Attorney General Daniel Lungren -- were not parties to the action below in the district court or in the court of appeals.

On September 10, 1991, Mr. Roy filed his First Amended Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of California. The action was styled Kenneth D. Roy, Petitioner, v. James Gomez, Director of Corrections, and Robert Borg, Warden, Respondents. (See Respondent's Appendix A at 1 (attached).) A verified answer was filed September 20, 1991 on behalf of the responding parties, Messrs. Gomez and Borg, acknowledging that they were the "proper parties" in the habeas action. (See Respondent's Appendix B at 1 & n.1 (attached).) Subsequently, pursuant to a stipulation, the district court ordered William Merkle, Warden, substituted in place of Robert Borg, Warden. (See Respondent's Appendix C (attached).) Thus, neither Mr. Lungren nor the People of the State of California were parties below.

///

Because the petitioners here were neither parties nor intervenors below, they may not bring this petition pursuant to 28 U.S.C. § 1254(1). See UAW, Local 288 v. Scofield, 382 U.S. 205, 208-09 (1965) ("only a 'party' to a case in the Court of Appeals may seek review here"); see also Director, Office of Workers' Compensation Programs v. Perini North River Assoc., 459 U.S. 297, 304 n.13 (1983); Supreme Court Rule 12.6.

Accordingly, the petition should be denied for lack of jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In their statement of the case, petitioners misstated and omitted pertinent facts. First, contrary to petitioners' statement, the decision of the three judge panel in the Ninth Circuit was authored by Judge Goodwin of the Ninth Circuit, not an Eighth Circuit Judge sitting by designation. Compare Petition at 6 n.4 with Roy v. Gomez, 55 F.3d 1483, 1484 (9th Cir. 1995).

Second, although petitioners claim that the omission of the specific intent element from the jury instructions was harmless in part because of the evidence before the jury (Petition at 5), petitioners omit from their statement of the case much of the substantial evidence that favored respondent and rendered the trial an extremely close case. For example, although petitioners rely on statements made by jailhouse informant Hudspeth (Petition at 8-9), petitioners fail to inform this Court that the California Court of Appeal found that the jury had rejected that

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informant's testimony. Appendix J at 45 ("They [the jury] disbelieved Hudspeth's testimony.").

Hudspeth, a convicted child molester, provided inherently incredible testimony, claiming that the decedent's pickup truck had been driven from the crime scene, even though in fact the truck was wrecked in a drainage ditch at the scene. (RT 3127, 3133.) Moreover, his testimony was drawn into question because an investigator from the District Attorney's Office had removed the informant from the jail and taken him to various locations involved in the case, thereby undermining the informant's claim that his knowledge of the circumstances was independently based on a statement from Mr. Roy. (RT 3378-79.) Likewise, petitioners fail to note the unusual fact that during the excursion, the informant was taken to the prosecuting attorney's home for a personal interview. (RT 3378-79.) Moreover, the informant's claim that he had been promised no favorable treatment for his testimony was impeached by a letter he had written his wife in which the informant stated, "I hope Mattly [the prosecuting attorney] comes through for me on his promise." (RT 3537; Appendix E at 13.) Furthermore, the investigators took the informant out for a meal at local restaurants on two occasions, and they also bought him cigarettes. (RT 3378-79.)

The other jailhouse informant, Sidney Hall, was impeached with numerous prior felony convictions: he was convicted of two armed robberies in 1956, a second degree burglary and an attempted second degree burglary in 1960, two more second degree

burglaries in 1965, receiving stolen property in 1976, and another second degree burglary in 1979. (RT 3235-36.) He also admitted a conviction in 1982 for assault with a deadly weapon for which he was sentenced to twelve years in state prison. (RT 3196.) In addition, Hall admitted contacting the prosecutor and the judge in an attempt to "make a deal" for favorable consideration. (RT 3237-38.)

Petitioners obliquely comment that the "wounds were consistent with those made by a buck knife." (Petition at 8.) However, petitioners omit the fact that the prosecution's own expert testified that the fatal wound was equally consistent with having been inflicted by the knife of Mr. Roy's companion, McHargue. (RT 2725-26, 2730; Appendix E at 11.)

Also conspicuous by its absence from petitioners' statement of the case is the evidence that Mr. Roy's ABO type A blood was the same as that of the decedent (RT 2807-10, 3764; Appendix E at 15), thus rendering largely insignificant the fact that ABO type A blood was found on Mr. Roy's buckknife.

Petitioners assert that the decedent's "key ring with keys were found among respondent's belongings . . . ." (Petition at 8.) However, petitioners neglect to inform the Court that the prosecution's own investigator testified that the keys did not fit any locks at the decedent's home or place of employment. (RT 3413-14.)

Petitioners purport to relate an admission by Mr. Roy that "he stabbed Clark and claimed Clark had started hassling him."

(Petition at 8 (citing RT 2182-83).) Petitioners neglect to include the balance of the statement, which shows that Clark was not merely "hassling" Mr. Roy, but in fact was attacking him. The record discloses that Mr. Roy said that Clark struck him in the chest and stomach. (RT 2182.) Indeed, there was other testimony that Clark attacked Mr. Roy and hit him in the head with a stick. (RT 3201.)

When both sides of the case are considered, it is apparent that the case was extremely close and the evidence of guilt equivocal.

ARGUMENT

REASONS THE PETITION SHOULD BE DENIED

The petition should be denied at the outset because the petitioners were not parties below. Moreover, certiorari should be denied because at bottom petitioners merely complain that the Ninth Circuit misapplied Brecht v. Abrahamson, 507 U.S. 619 (1993) (harmful and injurious effect on the verdict) and O'Neal v. McAninch, ___ U.S. ___, 115 S.Ct. 992 (1995) (applying Brecht in narrow circumstance of grave doubt) to the facts of Mr. Roy's case, and that is not a persuasive basis for a grant of certiorari. Furthermore, the purported conflict among the lower courts is illusory; the decision below was narrowly based on O'Neal, but none of the supposedly conflicting cases were decided based on O'Neal. In addition, the case below was rightly decided, and, in any event, the issue below is not likely to

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recur because the defective form jury instruction was amended more than a decade ago to remedy the error.

I.

ASSUMING ARGUENDO THAT THIS COURT HAS JURISDICTION, THE PETITION SHOULD BE DENIED BECAUSE THE PETITIONERS WERE NOT PARTIES TO THE ACTION BELOW.

Even if this Court has jurisdiction to grant a petition for writ of certiorari when the petitioners were not parties below, nevertheless this Court, in the exercise of its discretion, should decline to do so here. See Supreme Court Rules 10, 14.1(b), and 14.4.

II.

THE PETITION IS PREDICATED ON THE FALSE PREMISE THAT THE NINTH CIRCUIT DID NOT APPLY THE SUBSTANTIAL AND INJURIOUS EFFECT STANDARD, WHEN IN FACT THE COURT BELOW DID APPLY THAT STANDARD; HENCE PETITIONERS' REASONS FOR GRANTING THE WRIT ARE ILLUSORY.

Below, the Ninth Circuit expressly applied the substantial and injurious effect standard, not some "higher" standard of harmlessness. Roy v. Gomez, 81 F.3d 863, 868 (9th Cir. 1996) (en banc) (Appendix A at 15-16). In fact, citing Brecht v. Abrahamson, the Ninth Circuit expressly recognized that it had to determine whether "the error had a substantial or injurious effect on the jury's verdict, as required when error is raised in collateral proceedings." 81 F.3d at 868 (Appendix A at 14). Thus, contrary to petitioners' claim in their "Question Presented," the Ninth Circuit did not require the prosecution to "meet a higher standard for harmlessness . . . , rather than the

'substantial and injurious effect' standard dictated by Brecht v. Abrahamson." Petition at i (emphasis added; citation omitted).

The Ninth Circuit explicitly applied the Brecht standard as developed and refined in O'Neal:

> [i]n Brecht, the [United States Supreme] Court adopted a stricter standard for harmless error in habeas cases, holding relief is warranted on collateral attack only if the error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht, 507 U.S. at 623, 113 S.Ct. at 1714. More recently, the Supreme Court has held relief is also appropriate if the record on collateral review leaves the judge in "grave doubt" as to the effect of the constitutional error. See O'Neal v. McAninch, ___ U.S. ___, ___, 115 S.Ct. 992, 994-95 (1995). Relief was granted in O'Neal because the record was "so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of the error." O'Neal, ___ U.S. at ___, 115 S.Ct. at 995. In such circumstances, "the uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict (i.e., as if it had a substantial and injurious effect or influence in determining the jury's verdict')." Id. at ___, 115 S.Ct. at 994.

Roy, 81 F.3d at 868 (some citations omitted) (Appendix A at 15). Moreover, the Ninth Circuit expressly acknowledged that "[b]ecause this case reaches us on habeas, however, we must determine whether reversal is required under the Brecht/O'Neal line of cases." Roy, 81 F.3d at 868 (Appendix A at 15).

Petitioners erroneously assert that the court below "grafted onto the Brecht federal habeas harmless error standard the narrower method for determining prejudice on direct review of federal cases defined by Justice Scalia in his concurring opinion in Carella." (Petition at 11-12.) However, the court below flatly declared that it was not applying the direct review harmless error standard of Justice Scalia's concurrence in

Carella v. California, 491 U.S. 263 (1989). Noting that the harmless error standard of Justice Scalia's concurrence in Carella was the beyond a reasonable doubt standard from Chapman v. California, 386 U.S. 18 (1967), the Ninth Circuit stated that the "Chapman standard is inapplicable on collateral review . . . ." 81 F.3d at 868 (emphasis added) (Appendix A at 15).

The court below expressly recognized that it was required to follow the Brecht/O'Neal line of cases instead of Carella.

> We are unable to conclude under Carella that the jury necessarily found the missing element; if this case were before us on direct review, the error would not be harmless beyond a reasonable doubt, our analysis would be at an end, and we would be required to reverse the conviction. Because this case reaches us on habeas, however, we must determine whether reversal is required under the Brecht/O'Neal line of cases.

Roy, 81 F.3d at 868 (Appendix A at 15). Thus, the Ninth Circuit looked to the portion of Carella concerning a defendant's right to have a jury find all the elements of the offense. However, the Ninth Circuit did not apply the direct appeal harmless error standard of Carella, but rather applied the collateral review harmless error analysis of the Brecht/O'Neal line of cases.

In sum, the petition is flawed at its inception because it is based on the false premise that the Ninth Circuit applied a "higher" standard of harmfulness, rather than the substantial and injurious effect standard of Brecht and O'Neal. The decision below simply does not present the question that petitioners proffer this Court as a basis for the exercise of certiorari jurisdiction. Accordingly, the petition should be denied.

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III.

PETITIONERS' ARGUMENT THAT THE LEGAL STANDARD WAS NOT PROPERLY APPLIED TO THE FACTS OF THE CASE BELOW IS NOT A REASON FOR THIS COURT TO GRANT CERTIORARI.

Certiorari should not be granted here because the petition in essence is nothing more than an argument that the court below incorrectly applied the governing legal standard. See Rules of the Supreme Court, Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.")

Petitioners insist that the court below applied a "higher standard of harmlessness . . . , rather than the 'substantial and injurious effect' standard dictated by Brecht v. Abrahamson." Petition at i (citation omitted). However, as demonstrated above, the Ninth Circuit expressly applied Brecht's harmful and injurious effect standard as refined and elaborated in O'Neal. Thus, in substance, petitioners' complaint is that the court below misapplied the standard. That does not constitute a persuasive reason for granting the writ.

The fact-bound nature of the petition is underscored by petitioners' contention that the conceded omission of the specific intent element was rendered harmless by the other jury instructions, the evidence before the jury and the jury's factual findings. (Petition at 5.) However, the evidence at trial was evenly balanced, and there were serious problems with the prosecution's evidence and the credibility of its witnesses. The very fact that respondent deemed it necessary to correct the

omissions from the trial evidence in petitioners' statement of the case underscores how fact-bound petitioners' complaint is. See, ante, Statement of the Case. Although petitioners disagree with the conclusion reached by the Ninth Circuit in applying the legal standard to the facts of the case below, that does not augur for granting the petition for a writ of certiorari.

IV.

THE CASE BELOW, NARROWLY DECIDED BASED ON O'NEAL, DOES NOT POSE A SPLIT IN THE CIRCUITS BECAUSE NONE OF PETITIONERS' PROFFERED CASES APPLIED O'NEAL.

Petitioners unsuccessfully strive to wring a conflict among the circuits from the decision below. The purported conflict is illusory.

The Ninth Circuit below expressly applied the harmless and injurious effect standard of Brecht as refined in O'Neal and applied to the rare circumstance of equipoise where the reviewing court finds itself in grave doubt. The decision below arises from such a rare and unusual situation. As the Ninth Circuit recognized, O'Neal was predicated on a situation where "the record was 'so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of the error.'" Roy, 81 F.3d at 868 (quoting O'Neal, ___ U.S. at ___, 115 S.Ct. at 995) (Appendix A at 15). Applying the O'Neal standard, the Ninth Circuit concluded that the instructional error of omitting the specific intent element was not harmless in Mr. Roy's case. Roy, 81 F.3d at 868.

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The decision below does not conflict with the cases from other circuits proffered by petitioners. None of the cases from the other circuits involved application of the O'Neal standard, which by its very nature only arises in the extremely rare and unusual case, where the record is "so evenly balanced[.]" O'Neal, ___ U.S. at ___, 115 S.Ct. at 995 (quoted in Roy, 81 F.3d at 868 (Appendix A at 15)).[1]

All of the collateral review cases that purportedly conflict with the decision below were decided in 1994, before this Court's 1995 decision in O'Neal. (See Petition at 12-14 (citing and discussing Libby v. Duvall, 19 F.3d 733 (1st Cir. 1994);[2] Rosa v. Peters, 36 F.3d 625 (7th Cir. 1994); Cuevas v. Washington, 36 F.3d 612 (7th Cir. 1994)).) Obviously, therefore, none of those cases applied the O'Neal standard, which was the narrow basis for the Ninth Circuit's decision below. Hence, there is no actual conflict between the decision below and the cases of other circuits. The purported conflict is, at most, illusory.

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[1] Petitioners also claim that the opinion of the Ninth circuit three judge panel in Mr. Roy's case "reflects the split among the circuits" because it "was penned by an Eighth Circuit judge sitting by designation." (Petition at 6 n.4.) Petitioners, however, are wrong; the three judge panel opinion was authored by Judge Goodwin of the Ninth Circuit, not an out-of-circuit judge sitting by designation. See Roy, 55 F.3d at 1484 (Appendix C at 4).

[2] Petitioners fail to note that this Court previously denied certiorari in Libby v. Duvall. See ___U.S. ___, 115 S.Ct. 314 (1994) (denying certiorari). At page 12 of the Petition, petitioners mistakenly cite the lead opinion of Libby v. Duvall as appearing at 19 F.3d 753; the citation should be 19 F.3d 733.

Furthermore, petitioners are not even internally consistent in their gloss of the decision below, leading one to question petitioners' claim of inter-circuit conflict. On one hand, petitioners contend that the decision below "was essentially that of the Libby dissent" (Petition at 13), i.e., "the conclusive presumption instruction [was] prejudicial under the Carella framework for determining harmlessness of the instructional error because the jury was 'at least reasonably likely' to have improperly found malice." Id. On the other hand, petitioners assert that the decision below followed the approach of the Cuevas dissent, which petitioners erroneously gloss as "the beyond-a-reasonable doubt approach of Carella . . . ." (Petition at 13-14.) However, the Ninth Circuit clearly stated that it was not applying Carella's beyond a reasonable doubt standard. Roy, 81 F.3d at 868 (Appendix A at 15).

Petitioners also contend that other circuits are in disarray over the harmless error standard on collateral review. (Petition at 14 (citing without discussing Peck v. United States, 73 F.3d 1220 (2d Cir. 1995) (section 2255 case) and Kontakis v. Beyer, 19 F.3d 110 (3d Cir. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 215 (1994)).) Because neither of those cases involved application of the O'Neal standard, they do not present any conflict with the ground of decision below.

Petitioners also cite a bevy of direct appeal cases, asserting that the federal and state courts are confused about the standard to be applied. (Petition at 14 (citing United

States v. Marder, 48 F.3d 564 (1st Cir. 1995); People v. Harris, 9 Cal.4th 407, 37 Cal.Rptr.2d 200, 886 P.2d 1193 (1994); People v. Kobrin, 11 Cal.4th 416, 45 Cal.Rptr.2d 895, 903 P.2d 1027 (1995); United States v. Raether, 82 F.3d 192 (8th Cir. 1996)).)

These cases in fact reflect no "confusion" that is ripe for or requires the intervention of this Court. In Marder, the First Circuit's discussion of the harmless error standards was dicta, and the court did not reach or resolve the issue, basing its decision on an alternate ground. 48 F.3d at 573-74. Likewise in Kobrin, as petitioners acknowledge, the discussion about the standard was mere dicta. (Petition at 14.) Moreover, neither in Harris nor Kobrin did the California Supreme Court purport to be confused or uncertain about the application of harmless error analysis on direct review. Similarly in Raether the Eight Circuit did not display any uncertainty about the proper resolution of the harmless error issue on direct appeal.

However, assuming arguendo that those cases reflect any confusion or division about the harmless error standard on direct appeal, the decision below does not present any conflict with those cases because it did not apply harmless error analysis on direct appeal but rather on collateral review.

V.

THE NINTH CIRCUIT RIGHTLY DECIDED THE CASE BELOW.

In arguing that the Ninth Circuit erred, petitioners mischaracterize the decision below. (Petition at 16-23.) First, petitioners repeat their erroneous claim that the Ninth Circuit

"performed its own beyond a reasonable court analysis following guidelines described in the Carella concurrence, a case addressing the beyond a reasonable doubt standard for direct review of instructional error." (Petition at 18.) However, the Ninth Circuit could not have been clearer when it emphatically declared that the beyond a reasonable doubt standard was "inapplicable on collateral review" and expressly applied Brecht and O'Neal, rather than the Carella beyond a reasonable doubt standard. 81 F.3d at 868 (Appendix A at 15).

Second, petitioners incorrectly assert that the decision below "essentially holds that whenever Beeman instructional error occurs, it is reversible per se." (Petition at 19.) In fact, the Ninth Circuit rejected Mr. Roy's argument that the error was reversible per se, and the Ninth Circuit disapproved its own prior precedents that were susceptible of that construction. 81 F.3d at 866-67 & n.3.

In short, petitioners criticize the court below for positions that the court did not adopt. For all the reasons given in the decision below, Mr. Roy's case was rightly decided.

VI.

PETITIONERS RAISE AN ARGUMENT THAT WAS NOT PRESENTED TO ANY COURT BELOW AND THAT PETITIONERS' COUNSEL CONCEDED AT ORAL ARGUMENT BEFORE THE EN BANC NINTH CIRCUIT HAD NOT BEEN RAISED.

Petitioners argue that the felony-murder special circumstance finding made by the jury demonstrates that Mr. Roy had the requisite specific intent. (Petition at 19.)

Petitioners, however, did not raise that argument in any court below. In fact, in response to questioning from the bench during oral argument before the en banc Ninth Circuit, petitioners' counsel conceded that she had not raised that argument. Pursuant to Rule 15.2 of the Rules of this Court, respondent objects to the presentation of that argument because petitioners did not raise it below, nor did the Ninth Circuit resolve it. See Stern, Gressman & Shapiro, Supreme Court Practice at 368 (6th Ed. 1986) ("normally the Court will not consider points or questions not raised below"). Cf. Youakim v. Miller, 425 U.S. 231, 234 (1976) ("Ordinally, this Court does not decide questions not raised or resolved in the lower court."); Delta Airlines v. August, 450 U.S. 346, 362 (1981) (question presented in petition but not in court of appeals not properly before Supreme Court).

Moreover, consideration of the merits of petitioners' argument would not change the analysis or the outcome because the jury's finding was also contaminated by defective jury instructions and was set aside on direct appeal. (See Appendix J at 21-23, 26, 36.)

VII.

EVEN IF THE DECISION BELOW WERE ERRONEOUS, CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE STANDARD FORM JURY INSTRUCTION WAS AMENDED MORE THAN A DECADE AGO TO REMEDY THE ERROR; HENCE THIS CASE DOES NOT PRESENT AN IMPORTANT ISSUE THAT IS LIKELY TO RECUR.

The concededly erroneous jury instruction omitted the specific intent element of the offense of aiding and abetting. This case does not present an important issue for this Court

because the error in the jury instruction was remedied in 1984, when the California Supreme Court identified the defect. See People v. Beeman, 35 Cal.3d 547, 199 Cal.Rptr. 60, 674 P.2d 1318 (1984) (finding former instruction, such as given at Mr. Roy's trial, inadequate). Thus, the unique error presented by Mr. Roy's case should not recur with any frequency. This is analogous to the situation where a statute has been amended in a manner that will prevent a problem from arising in the future. In that situation, this Court has denied review on certiorari, despite a square conflict among the lower courts. See Stern, Gressman & Shapiro at 200 (citing United States v. Abrams, 344 U.S. 855 (1952); Community Services, Inc. v. United States, 342 U.S. 932 (1952); Sokol Brothers Co. v. Commissioner, 340 U.S. 952 (1951); United States v. Beal, 340 U.S. 852 (1950)).

Accordingly, this Court should decline to grant the petition here.

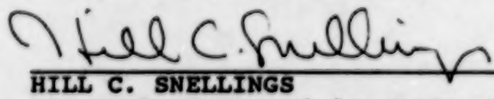
CONCLUSION

For the reasons stated, respondent Mr. Roy respectfully requests this Court to deny the petition for a writ of certiorari.

Dated: August 16, 1996

Respectfully submitted,

BLACKMON, DROZD & SNELLINGS



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RESPONDENT'S APPENDIX A

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Attorney for Petitioner
KENNETH D. ROY

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

KENNETH D. ROY, Petitioner, v. JAMES GOMEZ, Director of Corrections and ROBERT BORG, Warden, Respondents.	NO. CIV. S-89-1643-LKK/PAN FIRST AMENDED PETITION FOR A WRIT OF HABEAS CORPUS

Kenneth Wayne Roy is now incarcerated at Folsom Prison under the custody of Warden Robert Borg and Director of Corrections James Gomez. Mr. Roy petitions this Court for a writ of habeas corpus because his confinement is in violation of the United States Constitution.[1] This petition is filed pursuant to court order filed June 17, 1991.

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[1] For the convenience of the court, the paragraphs in this petition correspond to the numbered paragraphs in the model form application for habeas corpus under 28 U.S.C. § 2254 as set forth in the appendix to the Rules Governing Section 2254 Cases in the United States District Courts.

1. Mr. Roy attacks the judgment of conviction entered against him in the Superior Court of Shasta County, California in case number 76386 on counts two and four, i.e., the first degree murder of Archie Mannix and the robbery of Archie Mannix.

2. Mr. Roy was convicted on November 8, 1983, and he was sentenced on January 5, 1984.

3. Mr. Roy is now serving a sentence of 46-years-to-life: 16-years-to-life for second degree murder on count one; 25-years-to-life for first degree murder on count two, and five years for robbery on count four.

4. Count one alleged first degree murder of James Clark in violation of California Penal Code section 187; it was further alleged that petitioner used a knife, within the meaning of C.P.C. section 12022(b); special circumstances were alleged as follows: first, that the murder was committed during a robbery, under C.P.C. section 190.2(a)(17)(ii), and, second, that petitioner was charged with another murder in the same proceeding, under C.P.C. section 190.2(a)(3).

Count two alleged first degree murder of Archie Mannix in violation of C.P.C. section 187; it was further alleged that petitioner used a knife, within the meaning of C.P.C. section 12022(b); special circumstances were alleged as follows: first, that the murder was committed during a robbery, under C.P.C. section 190.2(a)(17)(ii), and, second, that petitioner was

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charged with another murder in the same proceeding, under C.P.C. section 190.2(a)(3).

Count three alleged robbery of James Clark in violation of C.P.C. section 211; it was further alleged that petitioner used a knife, within the meaning of C.P.C. section 12022(b).

Count four alleged robbery of Archie Mannix in violation of C.P.C. section 211; it was further alleged that petitioner used a knife, within the meaning of C.P.C. section 12022(b).

On count one, Mr. Roy was convicted of second degree murder; the jury found that Mr. Roy was personally armed with and used a knife.

On count two, Mr. Roy was convicted of first degree murder; the jury found that Mr. Roy was personally armed with and did not personally use a knife.

Mr. Roy was acquitted on count three.

On count four, Mr. Roy was convicted of robbery; the jury found that Mr. Roy was personally armed with and did not personally use a knife.

5. Mr. Roy entered a not guilty plea to all counts.

6. Mr. Roy was tried by a jury, both at the guilt and penalty phase.

7. Mr. Roy did not testify at trial.

8. Mr. Roy appealed his conviction.

9. (a) He appealed to the Third District Court of Appeal, case number C000992.

(b) The court of appeal reversed the special circumstances, and found the aiding and abetting instructional error harmless as to the substantive offenses.

(c) The opinion issued on January 27, 1989.

As a result of the reversal of the special circumstances, Mr. Roy was resentenced after the district attorney decided not to retry the special circumstances. Mr. Roy appealed his new sentence.

(a) He appealed to the Third District Court of Appeal, case number C007071.

(b) The Court of Appeal agreed with Roy that his sentence had been improperly calculated, and remanded for the abstract of judgment to be corrected. In other respects, the judgment was affirmed.

(c) The opinion was filed on September 24, 1990.

10. Mr. Roy's previous petition is described below in paragraph 11.

11. (a) Mr. Roy filed a petition for a writ of habeas corpus in the California Supreme Court. In his petition for a writ of habeas corpus and his points and authorities in support of his petition, Roy claimed that Beeman error violated his due process right to proof beyond a reasonable doubt of all elements of the offense and violated his right to jury trial by

directing a verdict against on the issue of intent. There was no evidentiary hearing, and the California Supreme Court denied his petition without opinion on November 21, 1989.

(b) Mr. Roy has filed no other petition for relief, other than the currently pending petition in this court.

(c) No further petition was filed in any court.

(d) The California Supreme Court, in which Mr. Roy filed his habeas corpus petition is the highest state court.

(e) No appeal lies from an adverse decision of the California Supreme Court.

12. Mr. Roy alleges that his confinement based on counts two and four violates the United States Constitution:

A. GROUND ONE:

On the first degree murder conviction on count two and the robbery conviction on count four, Mr. Roy was denied his right to have the state prove all elements of the offense beyond a reasonable doubt by erroneous jury instructions that failed to require the state to prove or the jury to find that Mr. Roy intentionally aided and abetted the robbery or murder of Archie Mannix.

B. GROUND TWO:

On the first degree murder conviction on count two and the robbery conviction on count four, Mr. Roy suffered a directed verdict and was denied his right to jury trial by

erroneous jury instructions that removed from the jury's consideration, the element of whether Roy had the intent to aid and abet the robbery or the murder of Archie Mannix.

13. Both claims presented here were adjudicated by the California Supreme Court in denying Mr. Roy's petition for a writ of habeas corpus. In his petition for writ of habeas corpus, Mr. Roy alleged that "the trial court's failure to instruct the jury to find the essential element of intent is the functional equivalent of a direct [sic] verdict, in favor of the prosecution. It is further alleged that a directed verdict (1) relieves the jury of finding facts essential to the conviction, withdrawing their power to acquit; and (2) relieves the prosecution of its burden of proving the elements of a crime beyond a reasonable doubt." Petition for a writ of habeas corpus at 5. The points and authorities attached to the state petition for a writ of habeas corpus provide argument and citation in support of both allegations.

14. The only currently pending petition is the previously filed federal petition for a writ of habeas corpus. Leave to file an amended petition and supporting memorandum having been granted by the court at the status conference on May 30, 1991, this petition is filed to amend the previously filed petition.

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15. Mr. Roy has been represented as follows:

(a) at the preliminary hearing by Roger Gilbert, now judge of the Butte County Superior Court;

(b) at arraignment and plea by the above counsel;

(c) at trial by Jerry Kenkel, formerly of 330 Wall Street, P.O. Box 3970, Chico, California, 95927, and by William Patrick, now a judge of the Butte County Superior Court.

(d) at sentencing by William Patrick;

(e) on appeal by Julia C. Newcomb, formerly of the State Public Defender's Office, which is now located at 801 K Street in Sacramento, California; and on subsequent appeal by Paula Schlicter, now a judge in the San Mateo Municipal Court.

(f) on collateral post-conviction proceedings Mr. Roy had no assistance of counsel until this court appointed the Office of the Federal Defender;

(g) there have been no collateral post-conviction appeals.

16. Mr. Roy was sentenced on three counts in the same court and at the same time.

17. Mr. Roy has no <u>future</u> sentence to serve after completion of the sentence imposed by the judgment he now attacks. However, he will continue to serve the sentence of 16-years-to-life imposed on count one, which he is now serving.

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PRAYER FOR RELIEF

Based on the alleged violations of the United States Constitution and for the reasons set forth in the accompanying Memorandum of Points and Authorities, petitioner requests that the Court grant the writ of habeas corpus to release him from his unconstitutional confinement, or grant him a new trial, and grant such other relief as the court deems just and appropriate.

DATED: September 10, 1991

Respectfully submitted,

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HILL C. SNELLINGS
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KENNETH D. ROY

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

KENNETH D. ROY, Petitioner, v. JAMES GOMEZ, Director of Corrections and ROBERT G. BORG, Warden, Respondents.	NO. CIV. S-89-1643-LKK/PAN CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the Federal Defender for the Eastern District of California and is a person of such age and discretion as to be competent to serve papers.

On September 10, 1991, she personally served a copy of the attached **FIRST AMENDED PETITION FOR A WRIT OF HABEAS CORPUS** as follows:

BY MAIL

Ms. Margaret Garnand Venturi
Deputy Attorney General
P. O. Box 944255
Sacramento, CA 94244-2550

DATED: September 10, 1991

LUPE HERNANDEZ

RESPONDENT'S APPENDIX B

COPY

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Acting Senior Assistant Attorney General
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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KENNETH D. ROY, Petitioner, v. JAMES GOMEZ, ET AL., Respondents.	CIV. No. S-89-1643 LKK-PAN

VERIFIED ANSWER TO FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

(With attached Exhibits 1 - 4)

TABLE OF EXHIBITS

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TABLE OF CASES AND AUTHORITIES

COPY

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VERIFIED ANSWER TO FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

COME NOW respondents James Gomez, Director of the Department of Corrections of the State of California, et al.,[1/]

1. The original petition named James Rowland, then Director of the California Department of Corrections, as respondent. Mr. James Gomez is now Director of Corrections, and Mr. Robert Borg is the present warden of Old Folsom prison where petitioner remains incarcerated. Accordingly, pursuant to Federal Rules of Civil Procedure, rule 25, subdivision (d), petitioner has substituted the latter as proper parties and respondents in this habeas action.

and, in answer to the "First Amended Petition for A Writ of Habeas Corpus" ("amended petition") filed in the above-named case on September 10, 1991, by petitioner Kenneth D. Roy, allege:

1. Petitioner is duly and lawfully confined at the California State Prison at Folsom (also known as "Old Folsom"), Represa, California.

2. The prison authorities are holding petitioner pursuant to a lawful judgment and sentence as is reflected in the second amended "Abstract of Judgment -- Prison Commitment" filed December 26, 1990, in *People* v. *Kenneth Duane Roy*, Butte County[2/] Superior Court Case No. 76386 (see declaration of prison case records manager and certified copy of second abstract of judgment, attached hereto as exh. 1). Respondents are informed and believe that this second amended abstract of judgment is the most current abstract of judgment filed in the superior court (see and compare, exh. 2, copy of second amended abstract of judgment certified by the clerk of Butte County Superior Court). Although there apparently remains a need to resolve an issue regarding calculation of petitioner's custody credits (see exh. 1, p. 1 and exh. 3), that issue is not before this Court in the instant habeas action and has no significant impact on the matters raised herein by petitioner.

2. Petitioner in his amended petition (see paragraph 1 at p. 2 of amended petition) and respondent in its answer have mistakenly stated that the judgment against petitioner was rendered in Shasta County Superior Court. However, all state superior court proceedings have been in Butte County, and the judgment against him was rendered in that county (see exhs. 1, 4; see also, exh. C to respondent's answer).

3. Petitioner has been in continuous custody since his original sentencing date of January 5, 1984 (see exh. 3, p. 1).

4. The second amended abstract of judgment under which petitioner is being held reflects that he is serving a minimum prison term of 46 years following his November 8, 1983, convictions by jury trial for second degree murder, first degree murder and robbery plus certain enhancements (exhs. 1, 2; see also pp. 2-3 & 13-14 of exh. 4, opinion of Court of Appeal, Third Appellate District, Case No. 76386, issued September 24, 1990, in petitioner's appeal following his re-sentencing in this case). Specifically, petitioner is serving the upper term of five years on count IV, the robbery charge; a term of fifteen-years-to-life enhanced by one year for use of a knife on count I, the second-degree murder charge; and a term of twenty-five-years-to-life on count II, the first degree murder charge. The terms imposed on all counts are to be served consecutive to each other, and the robbery term is to be served first. (*Ibid.*)

5. In the instant first amended petition for habeas corpus, petitioner for the first time challenges his robbery conviction and continues his challenge to his first degree murder conviction raised in his initial petition (see page 2 of amended petition). In his original petition, and heretofore in these proceedings, petitioner had challenged only his conviction on count II for first degree murder (see page 1 of petitioner's status report filed herein on May 23, 1991; see also original petition, p. 2).

6. On February 5, 1990, respondents filed an answer to petitioner's original petition, and respondents continue to rely on, and incorporate by this reference herein, the allegations submitted in that answer and the memorandum of points and authorities accompanying that answer.

7. In the amended petition, petitioner has again failed to establish that his challenged convictions were obtained in violation of federal constitutional law.

8. Respondents specifically deny that any of petitioner's rights have been violated in any manner.

9. Except as otherwise admitted herein, or as established by a record of proceedings in a competent court, respondents deny each and every allegation in the amended petition and any documents referred to therein or attached thereto.

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WHEREFORE, respondents pray that no order to show cause be issued, that petitioner's application for writ of habeas corpus be denied and dismissed and that petitioner take nothing by this action.

DATED: September 20, 1991.

Respectfully submitted,

DANIEL E LUNGREN
Attorney General of the State of California

GEORGE WILLIAMSON
Chief Assistant Attorney General

ROBERT R. ANDERSON
Acting Senior Assistant Attorney General

SHIRLEY A. NELSON
Supervising Deputy Attorney General

MARGARET GARNAND VENTURI
Supervising Deputy Attorney General

Attorneys for Respondent

MGV:ch
SA89FH0086
September 20, 1991

VERIFICATION

I hereby declare under penalty of perjury under the laws of the State of California that I am a Supervising Deputy Attorney General of the State of California and one of the attorneys assigned to represent respondents in this proceeding, that I have written the above answer to petitioner's amended petition, and that, based on review of the files of the State of California Office of the Attorney General maintained in connection with petitioner's appeals from his conviction at issue in this case and from his re-sentencing, I am informed and believe that the matters alleged therein are true and correct.

Executed this 20th day of September, 1991, at Sacramento, California.

MARGARET GARNAND VENTURI
Supervising Deputy Attorney General
Declarant

COPY

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KENNETH D. ROY, Petitioner, v. JAMES GOMEZ, ET AL., Respondents.	CIV. No. S-89-1643 LKK-PAN DECLARATION OF PERSONAL SERVICE

I declare:

I am 18 years of age or older and not a party to the within entitled cause. I personally served the attached VERIFIED ANSWER TO FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS (With attached Exhibits 1 - 4) in said cause, by personally delivering a true copy thereof [directed to the Attention of HILL C. SNELLINGS, Assistant Federal Public Defender] to the following named person on the date and at the address as follows:

NAME/ADDRESS **DATE**

Hill Snellings September 20, 1991

801 "K" Street, Suite 1024

Sacramento, California, 95814

I further declare, under penalty of perjury, the foregoing is true and correct and that this declaration was executed on September 20, 1991, at Sacramento, California.

MARGARET GARNAND VENTURI
(Typed Name)

Margaret Venturi
(Signature)

(SUBMITTED ON BEHALF OF THE OFFICE OF THE ATTORNEY GENERAL, STATE OF CALIFORNIA, 1515 "K" Street, Post Office Box 944255, Sacramento, CA 94244-2550 -- Attention: MARGARET GARNAND VENTURI, Deputy Attorney General [(916) 324-5252].)

RESPONDENT'S APPENDIX C

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KENNETH D. ROY

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

KENNETH D. ROY,

Petitioner,

JAMES GOMEZ, et al.,

Respondents.

No. CIV-S-89-1643 DFL PAN P

STIPULATION AND PROPOSED ORDER TO SUBSTITUTE WARDEN-RESPONDENTS

Petitioner, Kenneth D. Roy, by and through his counsel, Hill C. Snellings of Blackmon & Drozd, and Respondent-Warden's Robert Borg and William Merkle, by and through their counsel, Margaret Garnand Venturi, Supervising Deputy Attorney General, hereby stipulate and agree to substitute William Merkle in the place of Robert Borg as the Warden-Respondent in the instant habeas petition. This substitution of Warden-Respondents does not effect the substance of the pending habeas corpus petition, but is necessary to reflect the fact that Mr. Roy is now incarcerated under the custody of William Merkle. The

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amended caption would read Kenneth D. Roy, Petitioner v. James Gomez, Director of Corrections and William Merkle, Warden, Respondents.

IT IS SO STIPULATED.

Dated: April 8, 1993

HILL C. SNELLINGS

Dated: April 7, 1993

MARGARET GARNAND VENTURI

IT IS SO ORDERED.

Dated: 4/16/93

DAVID F. LEVI, Judge
United States District Court

SUPREME COURT OF THE UNITED STATES

CALIFORNIA ET AL. *v.* KENNETH DUANE ROY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 95–2025. Decided November 4, 1996

PER CURIAM.

A California court convicted the respondent Kenneth Roy of the robbery and first-degree murder of Archie Mannix. The State's theory, insofar as is relevant here, was that Roy, coming to the aid of a confederate who was trying to rob Mannix, helped the confederate kill Mannix. The trial judge gave the jury an instruction that permitted it to convict Roy of first-degree murder as long as it concluded that (among other things) Roy, "with knowledge of" the confederate's "unlawful purpose" (robbery), had helped the confederate, *i. e.*, had "aid[ed]," "promote[d]," "encourage[d]," or "instigate[d]" by "act or advice the commission of" the confederate's crime. The California Supreme Court later held in *People* v. *Beeman*, 35 Cal. 3d 547, 561, 674 P. 2d 1318, 1326 (1984), that an identical instruction was erroneous because of what it did not say, namely that state law also required the jury to find that Roy had the "knowledge [and] *intent or purpose* of committing, encouraging, or facilitating" the confederate's crime. *Id.*, at 561, 674 P. 2d, at 1326 (emphasis added). Despite this error, the California Court of Appeal affirmed Roy's conviction because it found the error "harmless beyond a reasonable doubt." See *Chapman* v. *California*, 386 U. S. 18, 24 (1967). The California Supreme Court denied post-conviction relief.

Subsequently Roy, pointing to the same instructional error, asked a Federal District Court to issue a writ of habeas corpus. The District Court denied the request

because, in its view, the error was harmless. Indeed, the District Court wrote that no rational juror could have found that Roy knew the confederate's purpose and helped him but also found that Roy did not *intend* to help him. A divided Ninth Circuit panel affirmed. *Roy* v. *Gomez*, 55 F. 3d 1483 (1995).

The Ninth Circuit later heard the case en banc and reversed the district court. It held that the instructional error was not harmless. 81 F. 3d 863 (1996). In doing so, the majority applied a special "harmless error" standard, which it believed combined aspects of our decisions in *Carella v. California*, 491 U. S. 263 (1989), and *O'Neal* v. *McAninch*, 513 U. S. ___ (1995). The Ninth Circuit described the standard as follows:

> "[T]he omission is harmless only if review of the facts found by the jury establishes that the jury *necessarily* found the omitted element." 81 F. 3d, at 867 (emphasis in original).

As we understand that statement in context, it meant

> "[T]he omission [of the "intent" part of the instruction] is harmless only if review of the facts found by the jury [namely, assistance and knowledge] established that the jury *necessarily* found the omitted element [namely, "intent"]." *Ibid.*

The State of California, seeking certiorari, argues that this definition of "harmless error" is far too strict and that this Court's decisions require application of a significantly less strict "harmless error" standard in cases on collateral review. See *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993); *O'Neal*, *supra*.

We believe that the State, and the dissenting judges in the Ninth Circuit, are correct about the proper standard. The Ninth Circuit majority drew its special standard primarily from a concurring opinion in *Carella*, *supra*, a case that dealt with legal presumptions. The concurrence in that case set out the views of several Justices about the proper way to determine whether an

error in respect to the use of a presumption was "harmless." Subsequent to *Carella*, however, this Court held that a federal court reviewing a state court determination in a habeas corpus proceeding, ordinarily should apply the "harmless error" standard that the Court had previously enunciated in *Kotteakos* v. *United States*, 328 U. S. 750 (1946), namely "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.' " *Brecht*, *supra*, at 637 (citing *Kotteakos* v. *United States*, 328 U. S. 750, 776 (1946)). The Court recognized that the *Kotteakos* standard did not apply to " 'structural defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards,' " 507 U. S., at 629, but held that the *Kotteakos* standard did apply to habeas review of what the Court called "trial errors," including errors in respect to which the Constitution requires state courts to apply a stricter, *Chapman*-type standard of "harmless error" when they review a conviction directly. 507 U. S., at 638. In *O'Neal*, *supra*, this Court added that where a judge, in a habeas proceeding, applying this standard of harmless error, "is in grave doubt as to the harmlessness of an error," the habeas "petitioner must win." *Id.*, at ___ (slip op., at 3).

The case before us is a case for application of the "harmless error" standard as enunciated in *Brecht* and *O'Neal*. This Court has written that "constitutional error" of the sort at issue in *Carella* is a "trial error," not a "structural error," and that it is subject to "harmless error" analysis. *Arizona* v. *Fulminante*, 499 U. S. 279, 306–307 (1991). The state courts in this case applied harmless-error analysis of the strict variety, and they found the error "harmless beyond a reasonable doubt." *Chapman*, *supra*, at 24. The specific error at issue here—an error in the instruction that defined the crime—is, as the Ninth Circuit itself recognized, as easily characterized as a "misdescription of an element" of the crime, as it is characterized as an error of

"omission." 81 F. 3d, at 867, n. 4. No one claims that the error at issue here is of the "structural" sort that " 'def[ies] analysis by "harmless error" standards.' " *Brecht*, *supra*, at 629. The analysis advanced by the Ninth Circuit, while certainly consistent with the concurring opinion in *Carella*, does not, in our view, overcome the holding of *Brecht*, followed in *O'Neal*, that for reasons related to the special function of habeas courts, those courts must review such error (error that may require strict review of the *Chapman*-type on direct appeal) under the *Kotteakos* standard. Thus, we are convinced that the "harmless error" standards enunciated in *Brecht* and *O'Neal* should apply to the "trial error" before us as enunciated in those opinions and without the Ninth Circuit's modification.

For these reasons, we grant respondent's motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari, vacate the Ninth Circuit's determination, and remand for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE GINSBURG joins as to Part I, concurring.

I

I agree with what the Court decides in its *per curiam* opinion: that the *Brecht-O'Neal* standard for reversal of the conviction ("grave doubt as to the harmlessness of the error") rather than the more stringent *Chapman* standard (inability to find the error "harmless beyond a reasonable doubt") applies to the error in this case when it is presented, not on direct appeal, but as grounds for habeas corpus relief. The Ninth Circuit did not apply that more deferential standard, and I therefore concur in the remand.

I do not understand the opinion, however, to address the question of what *constitutes* the harmlessness to which this more deferential standard is applied—and on that point the Ninth Circuit was quite correct. As we held in *Sullivan* v. *Louisiana*, 508 U. S. 275 (1993), a criminal defendant is constitutionally entitled to a *jury verdict* that he is guilty of the crime, and absent such a verdict the conviction must be reversed, "no matter how inescapable the findings to support that verdict might be." *Id.*, at 279. A jury verdict that he is guilty of the crime means, of course, a verdict that he is guilty of *each necessary element* of the crime. *United States* v. *Gaudin*, 515 U. S. ___, ___ (1995) (slip op., at 17). Formally, at least, such a verdict did not exist here: the jury was never asked to determine that Roy had the "intent or purpose of committing, encouraging, or facilitating" his confederate's crime. *People* v. *Beeman*, 35 Cal. 3d 547, 561, 674 P. 2d 1318, 1326 (1984).

The absence of a formal verdict on this point can not be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise. To allow the error to be cured in that fashion would be to dispense with trial by jury. "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty." *Sullivan, supra,* at 280. The error in the present case can be harmless only if the jury verdict on other points effectively embraces this one or if it is impossible, upon the evidence, to have found what the verdict *did* find without finding this point as well. See *Carella* v. *California*, 491 U. S. 263, 271 (1989) (SCALIA, J., concurring) I concur in the remand so that the Ninth Circuit may determine whether there is "grave doubt" that this is so, rather than (what it did) determine whether it is impossible to "be certain" that this is so, 81 F. 3d 863, 867 (1996). Elsewhere in its opinion, the Ninth Circuit purported to be applying the *O'Neal* standard, stating that "[w]hen

the reviewing court is unable to conclude the jury necessarily found an element that was omitted from the instructions," it "can only be 'in grave doubt as to the harmlessness of the error,'" 81 F. 3d, at 868 (quoting *O'Neal* v. *McAninch*, 513 U. S. ___, ___ (1995) (slip op., at 3)). That seems to me to impart to the determination a black-and-white character which it does not possess, any more than other determinations possess it. It can be "the better view," but far from "certain," that, given the facts in the record, no juror could find x without also finding y. What *O'Neal* means is that, when the point is arguable, the State's determination of harmless error must be sustained.

II

One final point: I write as I have written only because the Court has rejected the traditional view of habeas corpus relief as discretionary. See *Withrow* v. *Williams*, 507 U. S. 680, 720 (1993) (SCALIA, J., concurring in part and dissenting in part). But for that precedent, I would be content to grant federal habeas relief for this sort of state-court error only when there has been no opportunity to litigate it before, or when there is substantial doubt, on the facts, whether the defendant was guilty. See *ibid.*